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ABSTRACT

Five bills were discussed at this hearing: (1) S. 1050, which would allow the court to accept voluntary services and gifts and bequests; (2) H. R. 153, which would make certain technical amendments and modify various provisions relating to the court's operations and administration; (3) S. 868, which would improve educational benefits for active duty servicemembers and reservists who served during the Persian Gulf War; and (4) S. 1095 and (5) H.R. 1578, both of which would revise reemployment rights laws. Testimony included statements and prepared statements from the following: U.S. Senators Cranston, Jeffords, Simpson, Specter, and Thurman and individuals representing the University of Texas; Veterans' Employment and Training, Department of Labor; Reserve Affairs, Department of Defense; Paralyzed Veterans of America; AMVETS; Disabled American Veterans; Department of Veterans Affairs; National Veterans Affairs and Rehabilitation Commission; Office of Personnel Management; American Legion; Veterans of Foreign Wars of the United States; U.S. Court of Veterans Appeals; and Department of Justice. Appendixes include the five bills being considered, statements, views on S. 1095 and H.R. 1578, and written questions and responses. (YLB)

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S. Hrg. 102-502

LEGISLATION RELATING TO REEMPLOYMENT RIGHTS, EDUCATIONAL ASSISTANCE, AND THE U.S. COURT OF VETERANS APPEALS

ED344099

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

MAY 23, 1991

Printed for the use of the Committee on Veterans' Affairs

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LEGISLATION RELATING TO REEMPLOYMENT RIGHTS, EDUCATIONAL ASSISTANCE, AND THE U.S. COURT OF VETERANS APPEALS

THURSDAY, MAY 23, 1991

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SR-418, Russell Senate Office Building, Hon. Alan Cranston (Chairman of the Committee) presiding.

Present: Senators Cranston, Daschle, Specter, and Jeffords.

OPENING STATEMENT OF CHAIRMAN CRANSTON

Chairman CRANSTON. I welcome you all to today's hearing relating to veterans' education and employment issues, as well as to the U.S. Court of Veterans Appeals. Thanks to all the witnesses who are appearing before the Committee today for sharing your views with us.

The measures before the Committee are described in detail in my written statement, copies of which are available on the table in the hall.

With regard to the Court, there are two bills. S. 1050 would allow the Court to accept voluntary services and gifts and bequests. The other bill relating to the Court is H.R. 153, which the House passed on February 20, 1991. This bill would make certain technical amendments and modify various provisions relating to the Court's operations and administration.

With reference to the veterans' employment and education measures, the recent Persian Gulf conflict has underscored the impact that the commitment of our military forces has on the lives of so many individuals. I want to ask forgiveness for going on at a little bit of length about one aspect of this that I think bears some careful scrutiny.

Many active duty servicemembers and reservists had to leave school in order to serve in the Persian Gulf or in support of military operations there. S. 868 would restore educational assistance entitlement to those who were unable to complete their coursework due to service in connection with the Persian Gulf conflict and would protect reservists who were called up from losing any time in which to use their education benefits.

With the mobilization of about 228,000 reservists and National Guard members since last August, we have become acutely aware of the price that citizen soldiers, their families, and their employers must pay to meet our national security commitments around the world. Approximately 80 percent of the enlisted personnel and 90 percent of the officers who were activated were full-time employees in civilian jobs at the time of their order to duty.

As of last week, 2½ months after the fighting subsided, 118,000 reservists and Guard members were still on active duty. These individuals—and their families—were ready to make and have made many sacrifices. They performed their supporting roles extremely well during the buildup and the weeks of actual conflict, which of course was a very short time.

In exchange, I believe the Armed Forces should make it a priority to return these individuals to their civilian jobs and educational pursuits as quickly as operational needs can allow. They should not be kept on for the convenience of the military and doing jobs that could be turned over to active duty personnel or to contractors.

Generally speaking, employers have reacted in a patriotic and supportive manner. I am concerned, however that employer support—the main element in the successful workings of veterans' reemployment rights laws for over 50 years—may be severely tested with the continued deployment of half of the mobilized Reserve Force, while Regular Forces are being welcomed home.

If employers perceive the continuing retention of Reserves as unreasonable, support could deteriorate and put the entire total-force concept at risk.

Prior to Desert Shield, employment conflicts were said to account for as much as one-third of the unprogrammed losses in the Selected Reserves. I am concerned that figure could grow if the citizen soldiers are not back at their jobs when the parades are over.

As Chairman of this Committee, I am deeply concerned that 1,600 VA health-care workers—including 200 physicians and 900 nurses—are still not back.

As a Senator from California, I have received more than 100 letters—I have a stack of them here—from reservists and their families who are frustrated because the reservists are still not coming home. Let me read to you from some of these letters to give you a sense of the disruption in the lives of the fine men and women who are serving our country.

This letter is from a southern Californian: "When President Bush ordered the activation of certain reservists, my life was changed. My fiancé was called to serve his country. I learned more about the world and a little about politics during Desert Shield and then Desert Storm. However, now that the situation is somewhat under control and a peace treaty is at hand, I am left in a state of confusion and somewhat resentful that my fiancé is still in Okinawa with his release nowhere in sight."

I've heard from a number of reservists serving in Okinawa. Here's another letter from a young woman in Oregon whose fiance in Okinawa was just informed that he will be traveling to Singapore, Malaysia, and possibly the Philippines:

"My fiancé was taken out of school a week before his final exams. He was to graduate last January with a GPA of 3.5. Because of his departure, he lost all credits for the entire semester, he has completely missed the spring semester, and with this planned return sometime in September he will miss yet another semester. I feel these people should be home in time to register for the fall semester that starts in August."

Assistant Secretary Duncan, I hope that during your comments you can explain why reservists activated for Operation Desert Shield/Desert Storm are still in Okinawa, with plans to travel around the Far East.

I am also concerned about the number of doctors who have practices that they have left behind whose patients are leaving them and who may be losing their livelihoods. Here is a letter from a doctor in southern California:

"I am a physician and an Army reservist who was called to active duty in December 1990 to help with the national emergency. This is the commitment that I accepted as a reservist when I joined.

Now that the emergency no longer is present, my commitment has reverted to maintaining my solo medical practice and supporting my family. If I am gone for more than a few months, the doctors who refer to me will have changed their referral patterns and use another urologist. At 56 years of age, I don't have 5 years to begin to reestablish a practice nor can I borrow enough money to start again.

Today, we were informed that our Reserve unit was to be kept on active duty until December. This is primarily to fill the long-term void the service has had in treating retirees and military dependents. The price of going bankrupt and losing a practice that took 20 years to establish is too great for me to pay to save the military medical system a few dollars in patient care."

Another doctor from northern California has written about a colleague:

"I feel that it is wrong for this doctor, as a reservist, to be still stationed on the front while many active duty doctors have already come home. More importantly, we have a rural area that has sorely missed his medical services. He is a general surgeon and we very much need him. He has already been gone for 6 months. Please help us to get him home."

And this letter was from May 7. "I wonder if we are taking advantage of our medical reservists to fill longstanding shortages in our military medical care facilities."

Finally, this is from a Californian in the Naval Reserve now stationed in Puerto Rico:

"Most of us took a severe cut in pay and a lot have lost businesses, or are about to. We need your help to inquire as to why we are still here when our active duty replacements are in Mississippi and have been since January 1991.

"Our morale is on a downslide and we feel like the abused child locked in the closet that no one knows about. Please get us home while there is some yellow ribbon left."

Again, Assistant Secretary Duncan, I hope you will be able to explain the rationale behind the continued deployment of reservists over active-duty personnel.

As dramatic and far reaching as are the massive Reserve callups, the ongoing test of the reemployment rights law, year in and year out, relates to the ordinary requirements of being a member of the Selected Reserve or National Guard.

In S. 1095, we are proposing a complete revision of the 50-year-old reemployment rights laws. Our aim is to avoid delays and disputes in the implementation of the law by stating more clearly the rights and obligations of all parties.

At this time, I recognize the cooperative efforts of many here today who have had a part in bringing forward this needed revision. About 3 years ago, the Departments of Labor, Defense, VA and Justice, together with the Office of Personnel Management, began the tedious process of reorganizing this seemingly simple, but highly technical chapter of title 38.

Their efforts serve as the basis on which the Chairman of the House Veterans' Affairs Subcommittee on Education, Training, and Employment, Representative Penny, was able to develop H.R. 1578, a bill that the House passed on May 14. H.R. 1578, in turn, served as a starting point for S. 1095, which we developed with various changes and with further technical assistance from the Administration.

For 50 years, the Reemployment Rights Program has run very smoothly, due in large part to the efforts of the Department of Labor, where more than 90 percent of disputed cases are resolved by negotiation rather than litigation.

Much credit is also due the Department of Defense, whose National Committee for Employer Support of the Guard and Reserve keeps the lines of communication open between employees, their units, and their employers.

Finally, I note with appreciation the aggressive leadership taken by the Director of OPM during the recent Persian Gulf conflict to provide an affirmative support of Federal employees ordered to active duty.

I look forward to working with OPM, Labor, DOD, Justice and the other organizations represented here today, the Committee's Ranking Minority Member, Senator Specter, and all members of the Committee to develop legislation that will gain the support of our Committee.

Again, my sincere thanks for your participation today.

I also have an announcement to make about DIC reform. I've been working for several months to draft a bill to reform the DIC program. My proposal will address the present inequities in the system, without reducing benefits for those already receiving DIC.

I have not yet introduced a DIC reform bill because I feel that it would not be responsible to do that before we have a firm idea of the cost entailed. On April 2, Committee staff asked CBO to provide a preliminary cost estimate for my draft bill. Unfortunately, data currently available from VA are not sufficient to allow CBO to make a reliable estimate, and VA advises that it could take several months to collect sample data sufficient for this purpose. I will place in the record of this hearing a copy of a letter I received from CBO about this problem.

[The letter referred to appears on p. 160.]

Chairman Cranston. For these reasons, I have decided to remove DIC reform from the agenda of the June 12th hearing and the June 26th markup. This will enable other legislation—most notably the COLA for service-connected compensation—to go forward in a timely manner.

I plan to hold hearings on DIC reform proposals as soon as we receive the Administration's bill and a cost estimate for my bill.

[The prepared statement of Senator Cranston appears on p. 148.]

Chairman **Cranston**. Now, I'll turn to Arlen Specter, the Ranking Minority Member of the Committee for whatever opening remarks he may desire to make.

OPENING STATEMENT OF SENATOR SPECTER

Senator **Specter**. Thank you very much, Mr. Chairman.

I commend you for scheduling this important hearing on education and reemployment for our Gulf veterans and on very important issues generally for the veterans population.

I think it worth noting for the record that three of our colleagues are on the floor at this moment—Senator Thurmond, Senator Simpson and Senator Jeffords, all members of this Committee, and I was just there a moment ago—on the introduction of the education bill which the President has sponsored which will have a very important impact on what is being decided here.

I commend the very distinguished panel of witnesses and the very extensive efforts which have gone into the legislative proposals and the hearing which we are having today, an unusual coordination of four major departments—Department of Labor, Department of Defense, Department of Justice, the Office of Personnel Management—so that we have a very important lineup.

I'm not going to speak at length in an opening statement but would ask unanimous consent that my prepared statement be placed in the record.

[The prepared statement of Senator Specter appears on p. 161.]

Senator **Specter**. Regretably I'm going to have to excuse myself because we have Secretary of State Baker testifying before the Foreign Operations Subcommittee beginning in 10 minutes at 10 o'clock. There are so many critical issues, it's hard to single one out, but perhaps the most important issue for the veterans of America and for America is that there not be another war in the Gulf. The Administration and the Secretary of State are making Herculean efforts along that line.

I shall return if it is possible. In any event, I will be following these proceedings very closely as we work through our very ambitious schedule which the Chairman of the Committee has organized.

Thank you very much, Mr. Chairman.

Chairman **Cranston**. Thank you, Arlen, very much.

We now go to our first panel, those seated at the table, which consists of representatives of various executive branch agencies. I welcome Tom Collins, Assistant Secretary of Labor for Veterans' Employment and Training; Stephen Duncan, Assistant Secretary of Defense for Reserve Affairs; Stuart Schiffer, Deputy Assistant Attorney General for the Civil Division of the Department of Justice; and Patricia Lattimore, Deputy Associate Director for Career Entry Group, Office of Personnel Management.

Tom, if you would now summarize your testimony in 5 minutes, then we'll proceed with the other witnesses in the order in which I introduced you.

Thank you again very, very much.

STATEMENT OF HON. THOMAS E. COLLINS III, ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING, DEPARTMENT OF LABOR

Mr. COLLINS. Thank you, Mr. Chairman, for the opportunity to present testimony on this very important area of veterans' reemployment rights. I certainly support the Committee's effort and recognize your commitment toward strengthening the Veterans' Reemployment Rights Program through a new Uniformed Services Employment and Reemployment Rights Act.

I'll make a brief summary of the written testimony which is submitted for the record.

The citizen soldier is an American tradition. Throughout our history, Americans have left their civilian pursuits to defend the Nation and the principles of liberty and justice we cherish. The recent conflict in the Middle East has been no exception.

Thousands of men and women serving in the National Guard and the Reserve components were called to active duty to respond to an active aggression that challenged and threatened all who value freedom and rule of law. In addition, experienced merchant seamen left other lines of work to staff cargo and Navy vessels going to the theater of operations. Some have come back, others will return. They have and will be coming home—returning to their families and to the civilian endeavors they interrupted to serve our Nation.

Since 1940, the existing Veterans' Reemployment Rights law has protected employees who leave civilian jobs for voluntary or involuntary service in the regular military forces. Upon completion of their military service, they are entitled to return to their previous civilian jobs or similar jobs with the precise seniority, status, rate of pay, that they would have attained if they had remained continuously employed.

Throughout the years, amendments to the law have given Reserve and National Guard members the right to leaves of absence from their civilian jobs to participate in military training, and have protected them from service-related discharge or discrimination in employment by the employers.

Under the Total Force Policy, adopted by the Department of Defense in 1973 and recently validated by Operation Desert Storm, our country is more dependent than ever upon our Reserve components. An essential element of readiness is participation and training necessary to maintain and enhance military skills.

Reserve component personnel are unlikely to be willing to participate in such training unless they can be offered reasonable assurances that they will not suffer harm with respect to their civilian jobs and careers. For this reason, the effective enforcement of reemployment rights is more important than ever before.

After a 3-year effort by a task force of interested Federal agencies, the Administration proposed a comprehensive revision of the Veterans' Reemployment Rights statute to secure the reemployment rights of servicemembers. The need for this revision was magnified during the latest military action where large numbers—over

200,000—Reserve and National Guard members were activated and some weaknesses in the Veterans' Reemployment Rights law became more apparent.

The Administration's proposal, which has been substantially adopted by the House of Representatives as H.R. 1578, is designed to establish clearly the rights of servicemembers and the responsibilities of employers through clear, simple statutory language.

The Administration's intent also was to ensure that rights under the existing statute and its case law would be improved or preserved. In addition, we sought to reduce case loads and litigation through more timely resolution of differences.

We are very pleased that your Committee's leadership has proposed legislation that would accomplish many of these improvements, while also retaining and continuing the basic focus and rights of the current law. For example, S. 1095, like H.R. 1578, would help close the gaps in health insurance coverage; would continue to provide similar protections for Federal employees as well as non-Federal employees; would eliminate distinctions between categories of military training and service; would make the law more understandable; would outlaw employer reprisals for claimants; and it would assist recruitment and retention of reservists and members of the National Guard to support the Total Force Policy.

We are in the process of analyzing the provisions of S. 1095 and comparing them to the Administration's proposal and the House-passed bill, H.R. 1578. We will supply views on S. 1095 as soon as possible.

[The views referred to appear on p. 355.]

Mr. Collins. We can point out at this time that there are several areas of concern. I will just highlight these. Perhaps we can discuss them later and certainly we would need to address these in writing at a later date.

In the area of health insurance coverage, a vital part, there seems to be some uncertainties as to the intent of the Senate bill. The Administration and the House bill follows the basic pattern of COBRA.

There is some concern over the Senate bill's annual leave statement. We believe it is just rather unclear as to when on leave of absence, should the employee be entitled to leave of absence policies of the employer's or entitled to leave rights based upon the active work status.

S. 1095 would also increase direct spending; therefore, it would be subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act. We are preparing, with the help of OMB, an impact study on these costs.

We have some other suggestions for changes to the bill which we will be presenting in writing at a later date.

There is also a section in the proposed Senate bill which requires the Department, through my office, to undertake an extensive public information campaign. We believe this is unnecessary in the statutory language because this campaign is already well underway, has been very successful, and such a requirement in the statute would indeed be redundant.

In conclusion, we look forward to working with the Committee to clarify and simplify the current Veterans' Reemployment Rights statute, to the proposals in S. 1095 and to resolve all issues that we have addressed.

Thank you very much.

[The prepared statement of Mr. Collins appears on p. 172.]

Chairman **Cranston**. Steve, I want to ask each of you to try to do the 5 minute summary. Your full statement will go in the record.

STATEMENT OF HON. STEPHEN M. DUNCAN, ASSISTANT SECRETARY FOR RESERVE AFFAIRS, DEPARTMENT OF DEFENSE

Mr. **Duncan**. Thank you, Mr. Chairman.

I'm going to try to respond to some of the remarks you made in your opening remarks and then perhaps during the question and answer period we'll have a chance to explore them at greater length.

Let me commence by saying that this is a rather remarkable time in the history of American Reserve Forces. A lot of people have different impressions about what did and did not happen in Desert Storm. What did happen is that for the first time since our Nation went to an All-Volunteer Force and adopted the Total Force Policy, the Nation called reservists involuntarily to active duty and in addition to that, we had literally tens of thousands of people volunteer who were not called.

Chairman **Cranston**. You're speaking of reservists?

Mr. **Duncan**. Reservists, National Guardsmen and reservists. On one day, I recall that we had over 10,000 volunteers from the Air Reserve components alone. Those were volunteering on a given day.

We had almost 228,000 National Guardsmen and reservists who were called to active duty; 106,000 of those served in the Kuwaiti theater of operations; 71 reservists gave their lives in Desert Shield and Desert Storm; and I think by any fair standard, by any standard that I'm aware of, you could only conclude that their performance was absolutely outstanding. They responded with alacrity to the Nation's call to arms and they performed as only American volunteers who have the patriotism they do, could perform.

If you'd asked me 6 months ago, whether a callup of this magnitude could have gone so well, I would have said, I hope so, but I'm skeptical. But, it really did go this well.

I'm very pleased, and let me express my thanks to this Committee and the individual members on it, for the help we received on the Soldiers and Sailors Civil Relief Act. I think that went a long way to alleviating some of the perceived inequities by some of the members of those Reserve forces.

The particular legislation we're discussing this morning is something I have a great deal of personal interest in. I've been working on it personally since 1987. As a former Assistant U.S. Attorney, I have some firsthand experience dealing with statutes that are ambiguous and lead judges to reach different conclusions about what the rights of people are.

I think it's in the best interest, not only of American reservists, but of their employers, to have clear signals, absolute certainty as clearly as we can make it, of what the law permits and what the law requires.

I will tell you that our experience with American employers in this conflict has also been absolutely outstanding. Everywhere I go—as recently as last Friday in New Orleans when I was down welcoming home a squadron of 18 A-10 aircraft from the Air Force Reserves, the 926th Tactical Fighter Group—wherever I go, I ask about their relationship with their employers and I'm astounded at the support that American employers have given to our Guardsmen and reservists in the conflict.

To address specifically one of your concerns about what we're doing with reservists, let me summarize it in this way. There is considerable misunderstanding about why some reservists are still on active duty. There are lots of factors. I won't presume to go into them during my 5 minutes of opening, but let me summarize very quickly by saying, it's not accidental.

In the case of the Army, for example, almost 70 percent of the Army's combat support and combat service support elements—specifically medical units, transportation units, ammunition handlers, port handlers, water purifiers, civil affairs units, et cetera—are in the Army Reserve components. It was designed to be that way. We have more combat units in the Active component and far more support units in the Reserve components.

Those people with those precise logistical skills are the people that we need most as we're loading up the remaining 500 shiploads of things, including everything from people to ammunition, but whatever, to bring back to our country.

It was a magnificent projection of military force done under difficult circumstances, but it's no less difficult to bring all of that force back. Some of those people, many of those people, have precisely the skills that we need to help us load all of that up, and they are performing very, very well.

I will concede that there may be individual instances where they have not been told, and there is no excuse for that, if they've not been told exactly what the plans are or why they are being needed. That's all leadership and perhaps we need to look into some individual cases. We are doing that as we become aware of those individual cases.

The reservists also need to know that while the perception perhaps in the media was that the conflict ended on February 28, since then we've had the Kurdish situation, we've had the Bangladesh situation, we also have an awful lot of people—and this doesn't answer the equation entirely—we have an awful lot of active duty soldiers who had been deployed from home for months who then deployed for several additional months to go fight the war and have not been home in a great deal of time.

So what we're trying to do is to be as fair and equitable to all of the members of the Armed Forces as possible. This has Secretary Cheney's personal attention. Just this week, he informed me that he's discussed the matter with the Chairman of the Joint Chiefs of Staff, with Lieutenant General Pagonis over in the Persian Gulf.

It has the attention of the policy leadership of the Department. We're doing our very best and I'll be glad to discuss specifics with you about how we're going about the business of bringing our reservists home.

Let me summarize quickly with respect to the legislation at hand. We certainly endorse the concept of what the Congress is trying to do. I believe in the long run, it will benefit both reservists and their employers.

I might just conclude with a final note. I checked as recently as yesterday with my National Committee for Employer Support of the Guard and Reserve and was informed that at least measured by the number of telephone calls that are coming in from employers, employers continue to be very, very supportive and seem to have a very great understanding of precisely what we're trying to do, and that we're keeping reservists only to meet operational needs.

I can't predict for certainty how that will go in the future but as of yesterday, it seemed to be there was a pretty broad-based understanding by employers.

I'll look forward to your questions, Mr. Chairman. Thank you.

[The prepared statement of Mr. Duncan appears on p. 179.]

Chairman CRANSTON. Thank you very, very much.

Stuart.

STATEMENT OF STUART E. SCHIFFER, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. SCHIFFER. Good morning, Mr. Chairman.

I join my colleagues in expressing gratitude to the Committee for its consideration of this important legislation.

As the Chairman indicated, the existing Veterans' Reemployment Rights law has served well for over 50 years. Nevertheless, efforts to amend the statute have not always kept pace fully with changes such as the dramatic evolution of the role of the Reserves as part of our total military force. Equally, I think it's clear that recent years have seen substantial changes in the types of employment rights and benefits which are important in the civilian work force.

There can't be any more important incentive to voluntary military service than assurance of clearcut and unqualified rights to reemployment without penalty. I would place emphasis on the need for these to be clearcut and unqualified. Those who answer the call to their Nation's colors simply shouldn't have to fear for their civilian livelihood.

The need for legislative clarification and revision as embodied in the Administration proposal and in S. 1095 is probably best manifested by cases such as *King* v. *St. Vincent's Hospital*, to which we allude in our prepared statement and is currently before the Supreme Court.

It's an area of the law that can't abide ad hoc or unpredictable results. In the *King* case, the lower court engrafted a reasonableness requirement as have several courts on the duration, length, and type of service that qualifies for coverage under the act.

We believe these decisions were wrong but in any event, this creates a situation where individual reservists are almost dependent on the laws of 13 Federal circuits to ascertain whether their rights are going to be fully protected. This bill would make clear that such a requirement has no basis in the law, just as we think it had no basis in the existing law.

As illustrated by our petition for certiorari in the *King* case, the Justice Department takes its responsibilities to represent veterans who were denied reemployment very seriously. We've been pleased to work with our colleagues in the other executive agencies and the Congress on this legislation. I pledge that we will continue to work with your staffs to perfect the bill.

Our prepared testimony does take note of certain limited concerns we have with S. 1095. For example, we express concern about the notion of attorneys in the Office of Special Counsel representing Federal employees in the courts in cases where the Government is the defendant, but I want to assure the Committee of our overall support for the legislation and our willingness to continue to work with you to see that this bill is passed.

Thank you.

[The prepared statement of Mr. Schiffer appears on p. 186.]

Chairman CRANSTON. Thank you very, very much.

Patricia.

STATEMENT OF PATRICIA LATTIMORE, DEPUTY ASSOCIATE DIRECTOR, CAREER ENTRY GROUP, OFFICE OF PERSONNEL MANAGEMENT

Ms. LATTIMORE. Good morning, Mr. Chairman.

OPM also thanks you for inviting us to share our perspectives on the Uniformed Services Employment and Reemployment Rights Act. OPM shares my colleagues' view that VRR, a longstanding law, has been amended and subjected to numerous judicial interpretations and has become difficult and cumbersome to administer.

OPM strongly supports efforts to make the statutory employment protections for veterans and reservists stronger and clearer. We will generally defer to the Department of Labor's analysis of the details of S. 1095 and the differences between the Senate and House proposals for amending the VRR law.

The Federal Government, as an employer, is very proud of the longstanding tradition of support and encouragement of employees in our Reserve system and has a reputation already for offering considerably more benefits to reservists than do many employers.

OPM continues to be committed and willing to continue the fullest support of our veterans in the reservist system and believes that our returning veterans from the Gulf War, our citizen soldiers, deserve no less.

We thank you and we too are available to answer any questions that you may have.

[The prepared statement of Ms. Constance Berry Newman appears on p. 194.]

Chairman CRANSTON. Thank you very, very much.

Senator Jeffords has joined us. Do you have any opening remarks to make?

OPENING STATEMENT OF SENATOR JEFFORDS

Senator JEFFORDS. Yes, I do, Mr. Chairman. I'll just take a couple of minutes.

I certainly want to welcome everyone here to the hearing this morning, especially on the programs that we are discussing on education and employment benefits. This is an area of great interest to me.

This is kind of an education morning. We were just over on the House floor talking about the President's efforts in the bipartisan area and I'm headed off to the Education Committee on Higher Education after awhile.

I'd like to make the rest of my statement a part of the record, Mr. Chairman. I'm pleased to be here and am looking forward to the testimony.

[The prepared statement of Senator Jeffords appears on p. 166.]

Chairman CRANSTON. Thank you very much.

Steve, let me start by pursuing the matter that I stressed in my opening remarks. I appreciate your comments and your brief summary on my concerns.

I do want to explore the matter of the number of reservists and members of the National Guard ordered to do duty for Operation Desert Storm who are still on active duty more than 2 months after hostilities in the Persian Gulf have subsided.

I know the demobilization can be a lengthy process and that reservists were tasked with many of the duties necessary to support our current Gulf mission. I'm proud of their performance, as are you, and all who are aware of what they accomplished.

The fact that reservists have jobs or education pursuits to which they need to return and the fact that many have greatly reduced incomes while serving really has to be taken into account. Our ability to sustain a large Reserve Force depends on two key factors: the willingness of hundreds of thousands of individuals to volunteer for Reserve service and the cooperation of thousands of employers.

Keeping reservists on active duty for unnecessarily lengthy tours, if they are unnecessary, could be detrimental to both Reserve recruitment efforts and the cooperative spirit that you need from employers.

Can you expand a bit on what the services are doing to carry out the priority goal of bringing reservists home as rapidly as practical, all factors taken into consideration?

Mr. DUNCAN. Sure. Let me make several comments in response.

I'm sensitive to the issue because I was a reservist for 18 years and I was also a practicing attorney and as a professional, I darned well knew exactly what the risks were when I was called to active duty and how it would affect income, my family and et cetera. We didn't live near a naval base or military base, so I'm aware of these concerns firsthand.

Chairman CRANSTON. It is helpful that you have that background.

Mr. DUNCAN. I believe so. Let me tell you that I'm following this on literally a daily basis. I have discussed it with the service Secretaries, the issue with the Secretary of Defense, with military leadership, and so forth. No one in the Department of Defense would subscribe to the notion of keeping a reservist on active duty unnecessarily.

The issue is simply that we are still in a form of conflict, even though the shooting has stopped. I find this area similar to that part of Desert Shield before the shooting started in January but after we started sending forces there in August. We built up all of that force and recall that we started sending forces to the Persian Gulf in the middle of August of 1990. The shooting war did not start until January of 1991. It took us that long to get all of the logistical support system to the Persian Gulf.

One cannot reasonably expect to bring it home in much less time than that. We are doing our best, but we're talking about hundreds of shiploads of cargo, logistics and so forth. It is a fact—in retrospect, I think it was probably a good decision but something we'll be looking at—that we consciously placed much of the support systems—in the case of the Army, the biggest of the Armed Forces—in the Reserve components. This was not done accidentally.

For example, the case of medical personnel. The numbers of medical personnel that we need in peacetime for the members of the Armed Forces are considerably less than the numbers of medical personnel that we need in a shooting conflict. Our soldiers, marines, sailors, airmen, and coastguardsmen are absolutely entitled to good medical care. So, we place a large number of medical personnel in the Reserve components so they can be available for the Nation when they are needed in combat, but not on active duty at the cost of the American taxpayer in peacetime.

Well, it so happens that a large part of our medical personnel still in the Gulf are reservists. They were designed to be in the support structure. We've put much of the medical force structure into the Reserve component. I will tell you that we've already brought home over half of the medical personnel. We are looking at every one of these kinds of units and are asking our field commanders, the people who define the operational needs, to go through and to identify as best as they can, a date certain—understanding that these things change on a daily basis just like in a conflict, they don't go the way you plan always—but to identify as best as they can the dates on which various units in the Reserve components and Active components will be returning home, leaving the theater, and so forth.

They are working very hard to do that. We have had success in some services more than others but it is a fact, for example, that there are fewer coastguardsmen in the Persian Gulf than there are U.S. Army personnel. So it's a bigger problem in the Army to try to reach those objectives.

I talked to the Secretary of the Army. He has informed me, and I have so informed some of the members of the Senate of this, that the Army is going to utilize for this logistical return a small, predominantly Active component Residual Force, augmented by civilian contractor personnel to meet all of the remaining operational requirements.

The Army's Residual Force requirement for July is 20,000, 15,000 in September, 10,000 in November. Requirements beyond those for which the Army can enter into contracts are going to be met—this is the Army's plan—first with Active Component Forces, next with volunteers from the Reserve components—and we still receive a large number of volunteers—and then, if necessary, with other Active Component Forces. I've been assured that the Army's going to continue to rely upon the Reserve Forces only as a last resort and that every avenue is currently be explored to insure that no reservist is being kept on active duty any longer than is operationally necessary.

So the service Secretaries are following this. We are sensitive to the sacrifices made by reservists and make no mistake about it, reservists do make——

Chairman CRANSTON. If you could give us for the record in detail that study data to which you just referred?

Mr. DUNCAN. Yes, sir. I'd be happy to do that.

[Subsequently, Secretary Duncan furnished the following information:]

RESERVE COMPONENT PERSONNEL IN AOR

Service	Peak* (3/10/91)	Current (6/9/91)
Army	73,373	18,641
Navy	6,796	426
Air Force	11,123	1,977
Marine Corps	14,379	15
Coast Guard	376	2
Total	106,047	21,061

*March 10, 1991 represents the overall (in AOR and outside AOR combined) peak strength for total Reserve personnel activations during Operation DESERT SHIELD/STORM.

Mr. DUNCAN. We are very much sensitive to the fact that reservists make very large sacrifices to serve in the Reserve Forces. I'm speaking with firsthand knowledge. When you're away from your professional practice, you give up your free time and so forth to serve.

I also happen to believe that the great majority of reservists being volunteers, know what they were doing, knew what they were doing and are very happy to serve. We owe it to them not to keep them any longer than is necessary and we are doing our best to insure that we do not.

I can't alleviate every hardship. They do incur significant hardships to serve and we recognize that. So we're doing all we can by way of policy to insure that we're as fair and equitable to all of the members in the Armed Forces as we possibly can be.

Chairman CRANSTON. How many Reserves and National Guardsmen are still on active duty and serving in locations other than the Gulf?

Mr. DUNCAN. I don't have those numbers exactly. I'll do my best to give those to you. I'll be happy to do that. Anywhere in the world outside of the Persian Gulf.

[Subsequently, Secretary Duncan furnished the following information:]

OUTSIDE THE CONUS

Service	Peak* (3/10/91)	Current (6/9/91)
Army	9,550	2,472
Navy	2,965	509
Air Force	1,314	472
Marine Corps	2,240	2,494
Coast Guard	14	0
Total	16,083	5,947

IN CONUS

Service	Peak* (3/10/91)	Current (6/9/91)
Army	56,284	11,921
Navy	10,202	2,319
Air Force	22,197	12,828
Marine Corps	16,244	7,668
Coast Guard	600	276
Total	105,527	35,012

*March 10, 1991 represents the overall (in AOR and outside AOR combined) peak strength for total Reserve personnel activations during Operation DESERT SHIELD/STORM.

Chairman **Cranston**. Are they fairly substantial numbers?

Mr. **Duncan**. Well, they are not significant numbers at all if you include the continental United States. We called up, for example, in the case of the Naval Reserve, approximately 20,000 naval reservists called to active duty; about 50 percent of those were medical personnel. Many of those people went to places like naval hospitals in the United States so that the active duty medical personnel could go to the Persian Gulf. So we do have several people still serving in the continental United States.

If you combine the United States and the Persian Gulf situation, and then take into account that we also sent some reservists to Europe so active duty people could go over to the Persian Gulf from Europe, I don't know how you'd count it but we feel that they are not serving in any place that it's not needed, I'll put it this way.

Chairman **Cranston**. In my opening statement, I mentioned reservists who are still in Okinawa. Why are they being retained there and when will they be released?

Mr. **Duncan**. I'll have to supply an answer for the record on that? Are those Marine Corps reservists, Mr. Chairman, you're inquiring about, or do you not know?

[Subsequently, Secretary Duncan furnished the following information:]

Reserve ground units assigned to Okinawa as part of Marine Corps Unit Deployment Program (UDP) are scheduled to return in August 1991. These units include:

2d Bn/23d Marines	**(Encino, CA)**
1st Bn/24th Marines	**(Detroit, MI)**
G Btry/3d Bn/14th Marines	**(W. Trenton, NJ)**
C Btry/1st Bn/14th Marines	**(Jackson, MS)**

Aviation Units assigned to Okinawa as part of UDP are scheduled to return to CONUS by December 1991. These units include:

VMAQ-4 (EA-6B Sqdn)	(Whidbey Is., WA)
HML-771 (UH-1N)	(So. Weymouth, MA)
HML-776 (AH-1W)	(Glenview, IL)
HMH-772 (CH-53 Sqdn)	(Dallas, TX and Willow Grove, PA)

The primary purpose of UDP is to reduce the personnel turbulence associated with 12-month dependents-restricted tours in WestPac and to sustain maximum uniform readiness of tactical units throughout the Marine Corps.

In order to meet worldwide commitments, which included protection of U.S. interests during civil unrest in Liberia, Somalia, and the Philippines, in addition to Operations DESERT SHIELD/STORM, active Marine Corps squadrons on UDP were required to remain overseas for five additional months. The active squadrons that would normally replace them are just returning from Southwest Asia and need time to refurbish equipment and rotate personnel. Selected Marine Corps Reserve aviation squadrons will replace active squadrons extended on UDP for nearly one full year, until other active squadrons can be made available in December 1991.

Chairman CRANSTON. Yes, Marine Corps.

Mr. DUNCAN. Marine Corps reservists? I'll find out for you although I will tell you that I was just informed in the last 2 to 3 days by the Chief of the Marine Corps Reserve that many of the people that they even a couple of weeks ago thought they would have to retain even into the fall, they've reworked it and figured out a way to get them back so that a lot of those youngsters who would be starting school in the fall will be back in time to start college.

Chairman CRANSTON. The VA and a good many rural communities really need their doctors and other health-care professionals back. Are any special efforts being made to release health-care workers?

Mr. DUNCAN. I'm not sure. Of course that's being done on kind of a service-by-service basis, but let me suggest that you know, when we called reservists, we had by policy some standards that permitted exemptions in the case of hardships, including community hardship, so we didn't blindly — the Department of Defense did not blindly call up all reservists and be insensitive to the needs of communities, and individuals. By policy, each of the individual services had authority to go through on a case-by-case basis and look at each individual situation and to grant exemptions where facts merited them.

We're trying to be equally sensitive as we bring back people, but again, the driving factor will be the operational needs of the field commander.

Chairman CRANSTON. What can be done about cases like the two that I alluded to through reading their messages—one, a doctor who is very concerned about losing his practice; the other, someone telling about another doctor who not only is in danger of losing his practice, but whose services are very badly needed as a general practitioner in a rural community that is without that service now? What can be done in special cases like that?

Mr. DUNCAN. We're still and we will be for months and perhaps years studying how we can improve the process. One of the kinds of factors we're going to be looking at are those kinds of hardships.

I don't have any absolute answers but my initial impression is that we did a pretty good job in granting discretion to each of the military services to handle on a case-by-case basis instead of requiring broad policy results that required all the services to act absolutely in all cases the same way. We're balancing uniformity—so that people are treated equally and they aren't treated differently because they wear a blue uniform as opposed to a green uniform—versus the need to give the services flexibility in individual cases. I think we handled it pretty well.

As a practical matter, let's be candid. Our Reserve components are All-Volunteer Forces. I'm doing all I can, and I'm sure the Secretary and everyone in the Department is also, to be sensitive to that, but it is a fact that we can't alleviate all hardships. Sacrifices are involved in serving one's country. One who serves in the Reserves components I'm sure understands that the mere fact that the Nation has not called them to service in 5 years does not mean that the Nation may not have a need to call in the future. One has to be prepared to serve.

Our job in the Department of Defense is to make sure that it's applied equally, fairly, even-handedly, and that we don't keep them on active duty any longer than operationally necessary. We're doing our best to accomplish that.

Chairman **Cranston**. Do you have a system for looking at individual cases now to see if there is some particular hardship involved?

Mr. **Duncan**. Oh, sure.

Chairman **Cranston**. Not in terms of calling them up, in terms of letting them go?

Mr. **Duncan**. I've made several inquiries. As facts come to my knowledge that a particular unit may not be needed or something, I simply inquire from the service involved and ask the service Secretary to find out what's going on with that unit. So we don't hesitate to ask hard questions as we become aware of individual cases.

Chairman **Cranston**. What about the point that I mentioned in my opening remarks that active duty personnel are being returned from the Persian Gulf ahead of reservists and National Guard personnel? What's the explanation for that?

Mr. **Duncan**. Well, I guess I would need to know more specifics. In the abstract, that is not per se bad because, for example, many of the active forces are combat forces. If the operational commander decides we do not need an armored unit, a tank unit in the sands of Saudi Arabia, there is no reason to keep it and it should come home. But, while that active duty armored unit is coming home, we may have a desperate need for ammunition handlers and transportation companies to load all of that logistical force onto several hundred ships to bring it home. Those may be the reservists. It's simply that they have the skills that we need at this time.

Chairman **Cranston**. Senator Jeffords, my 10 minutes just ran out. Do you have any questions?

Senator **Jeffords**. Yes. I just want to follow up on the problems of rural doctors, and the Reserves' ability to attract new young doctors. After medical school, young doctors have extremely high debt loads. These debts are difficult to repay, especially if one is working in a rural area where salaries are lower. There are cases of doctors being deployed with their Reserve units for Operation Desert Storm. And now that they have returned, they are faced with keeping the banks happy as well as getting back into practice.

I'm concerned that if we don't do some of the things along the lines the Chairman was talking about to examine that, that we are going to have a very difficult time of attracting new, young doctors into the Reserves. You're right, they had 5 years without being called up, but that doesn't help us now because everybody's going to be looking at the suffering that some of those are being caused by economic problems in returning.

Mr. DUNCAN. I might respond just simply by saying, yes, there are those risks but I would hope that any young, future physician or nurse who contemplates joining the Reserve Forces would weigh the benefits against the potential risk of being called up to serve the country in cases that might involve some hardship.

Let me simply tell you a story. I could talk benefits all day but here's one that's pretty good, that directly affects physicians. When I first came to office, I was down in Honduras, I was there to observe National Guardsmen building roads, doing some nationbuilding, but I heard that there was a National Guard—I believe it was a National Guard, maybe Army Reserve—medical unit in a neighboring village and I wanted to see it.

I flew over there and as I landed, you could see that the people of the village had almost no understanding of basic concepts of cleanliness and hygiene and so forth. Yet, there was a large group of people and it was the end of the day, and they were circling around some Army medics.

I walked over to an Army Colonel who was sitting on a tree stump, a doctor, and he was physically drained, you could tell he was exhausted. I went over to him and I said, "Doc, what do you do in your private life?" He said, "I have a private medical practice in Utah." I said, "Why are you here? You don't smell very good, you're drained, you're exhausted, you're tired, you're dirty, and I can't pay you enough in 2 years to equal what you could earn in your medical practice in a short period of time, so why are you here?"

He said, "Well, obviously I want to serve, but I will tell you something. See that young woman over there wearing her only dress? She walked all day yesterday barefooted so her baby could see an American doctor and so long as you send me to places where I can see a direct connection between my service and that kind of reward, I don't care if you call me to active duty for weeks and weeks each year.

"If you have me standing around the Reserve center only conducting physicals on the weekends, I'm probably not very interested, but if you challenge me and work me hard, and I can see things that I will never see in my own private medical practice, see those kinds of rewards, I'll be with you forever."

So my job is to do all I can to make sure that our physicians understand that yes, there is the risk of those kinds of hardships, but in addition to that, there is the risk, and opportunity is not a risk, but the opportunity for service that they can never see in their private medical practice.

Senator JEFFORDS. Well, that's certainly a part of the reward system as well as retirement benefits and matters like that, but if you're a young doctor who has started in business and you come back and your malpractice insurance premium is due and you don't have enough money to pay for it, and the bank is wondering how you're going to get caught up on your loans that you borrowed for your equipment, as well as your loans that you had to get through medical school, it seems to me that we should look into such things as emergency loan programs, not necessarily give-aways, but ability for these to know that if they get into those kind of financial binds and the local banks or creditors are not willing to come forth, that we have a system to say OK, if you get into those problems, you can at least have access to capital to put you back on your feet.

Mr. **Duncan**. Of course I'd be prepared to explore discussions about anything that would help reservists. I must also tell you that I do see—and I speak from firsthand knowledge, not some obscure bureaucrat who has never done this himself—that all reservists also have a responsibility to take into account that the Nation may need them unexpectedly, and because you can't predict when the Nation may call, one probably ought to make sure that your professional house is in darned good order if you're going to continue to serve in the Reserve components.

That means you probably need to have a family plan, you need to give some thought as to how you would handle the professional situation if the Nation called, because we don't call unless you're desperately needed. We have not called reservists in over two decades, but when we called, we desperately needed them.

I would simply suggest that as a matter of good professional planning, all reservists ought to work on the assumption that the Nation may call someday and we'll do all we can to be helpful to them along the way.

Senator **Jeffords**. Thank you, Mr. Chairman.

Chairman **Cranston**. Thank you very much.

I'd like to address this to both you, Steve, and you, Patricia. In the case of those who have been released what administrative problems, if any, have you identified that involved Federal agencies?

Mr. **Duncan**. As employers, you mean, Mr. Chairman?

Chairman **Cranston**. Yes, sir.

Mr. **Duncan**. I'm not aware that we've any significant problems with Federal agencies that are any different than—I'm aware of some individual cases—but overall, that are any different than our civilian employers. At least they haven't reached my attention if they are significant.

Chairman **Cranston**. Patricia, do you have any?

Ms. **Lattimore**. The extent of our contact has been people looking for clarity on various provisions regarding returning reservists, but we have not had any specific problems we've had to resolve as of yet.

Chairman **Cranston**. The Department of Defense supports section 4327 of S. 1095 which in effect would override the judicially-established reasonableness test for training orders with regard to their timing or duration. If this provision were enacted, what policy would the Department adopt to avoid any increase in employment conflict?

Mr. **Duncan**. Well, I'll start with the proposition, Mr. Chairman, that it is in the best interest of our reservists not to have to litigate with their employers in a court of law. To the extent that conflicts arise with employers, I would much prefer to see those resolved informally and that's why we have our National Committee for Employer Support of the Guard and Reserve.

Many times, it's simply educating people as to what the requirements of law are. They are not here to make it hard for American employers. We really have stepped up and done a magnificent job during this conflict. We are all looking for certainty, so we can predict with some certainty what the law is, what the law requires.

If, in fact, the legislation is adopted and we see that it perhaps poses some kind of unreasonable hardship on employers, I'm certainly prepared to explore, by way of policy within the Department, what we might be able to do to alleviate that. We're not trying to be unfair to anyone. To the contrary, we're trying to be as fair as possible but we cannot live with these situations, factual situations where a reservist simply cannot predict how his employer is going to react because the law is unclear or how Federal courts might react because some may try to weigh the reasonableness of the Reserve callup versus the hardship on the employer. We can't live with that. We've got to be able to count on these reservists when the Nation calls.

Chairman CRANSTON. Steve, in your testimony, you indicated that representation of Federal employees by the Office of Special Counsel in Federal court which would review the Merit System Protection Board decisions is not warranted. Although the Board has considered only 10 veterans' reemployment cases since it was established more than 11 years ago, in 8 of those cases, the Board did not grant the relief sought by the employee.

Since the Federal Government provides representation to State and private sector employees all the way to the U.S. Supreme Court, why shouldn't the Federal Government also provide representation to Federal employees in the courts?

Mr. DUNCAN. You are referring to my prepared statement, Mr. Chairman? Is that where it's from?

Chairman CRANSTON. I believe that's where it is. You just said you indicated that representation of Federal employees by the Office of Special Counsel in reviews of Merit System Protection Board decisions isn't warranted. I just wondered what your rationale is?

Mr. DUNCAN. That's simply consistent with our colleagues over in the Justice Department, and I would frankly defer to Mr. Schiffer on that.

Chairman CRANSTON. Would you comment?

Mr. SCHIFFER. I think, first of all, Mr. Chairman, without saying that any individual case is not important, that the problem arises more in the abstract, in all honesty, than it does in reality. We have not the slightest quarrel with the notion that the Federal Government should be not just a model employer but indeed the model employer. I think the numbers to which you allude bear that out.

Our concerns are, very candidly, more of a policy nature than any suggestion that the Constitution is going to be torn asunder, but we are troubled by the notion of lawyers working for one Government agency—indeed, a Government agency that enjoys great independence—but lawyers for one Government agency litigating with lawyers for another agency.

The cases you cite where the Merit Systems Protection Board did not grant relief, I would suggest just as likely that relief was not granted because the cases were not found to be meritorious. I just don't know that there is a need to have Government agencies on both sides of the same case.

Chairman **Cranston**. Tom, do you have any comment on this issue?

Mr. **Collins**. Mr. Chairman, we do recognize that it continues to be an issue but we do not take issue with the Department of Justice. We have no big differences on this issue and in the Department of Labor, it is not a big issue with us because of our monitoring of caseloads and complaints. We have not identified it, frankly, as a large, overwhelming problem, so long as, of course, the Merit System Protection Board processes and procedures are working as they should. Of course, a lot of effort and attention has been devoted to that recently.

Chairman **Cranston**. Stuart, on the matter of the Government being on both sides, wouldn't it be obvious to a court that the Office of Special Counsel is representing an individual and is not representing the Federal Government?

Mr. **Schiffer**. I think indeed it would and I have no quarrel with that notion. Maybe I've belabored our concern too substantially, but I think the real point of our testimony is the Federal Government should be putting people back to work if there is the slightest argument—if there is any substantial merit in the argument. I just don't think we're going to run into a number of cases where this is a major issue.

Chairman **Cranston**. There are obviously not a lot of cases, but it is a question of fairness and equity and every individual is entitled to that. I don't want Federal employees to be short-changed.

Later this morning, Professor Harold Bruff from the University of Texas School of Law will testify on the issue of the constitutionality of this provision. If after Professor Bruff testifies any of you would like to submit a written rebuttal, I would ask you to do so, or any comments on what he has to say.

Tom, S. 1095 places a lot of responsibility on the Veterans Employment and Training Service to investigate employee complaints and to provide timely resolution of the conflict through negotiations relating to them. On the average, how much time currently expires between the opening and closing of a case and how does that compare with your timeliness standard?

Mr. **Collins**. Mr. Chairman, we have data that as of last Friday we have 235 complaints which have developed into cases. Our basic requirements are that a case be responded to immediately or within 3 days. If we adhere to that, our trained field staff—and we have achieved some excellent training recently through our National Veterans Training Institute over the last several years—are able to respond in a very timely manner.

We have had concern on the national level—and this is before the recent crisis—about backlogs of cases. I do not have those statistics with me this morning on what we refer to as our backlog of cases. There's hardly any backlog of cases that precedes the current Desert Shield/Desert Storm operations.

We have been very attentive and the survey report that I have that indicates there have been 235 complaints developed into cases to date relating to Desert Storm nationwide, also indicates—these are strictly indicators from the survey not census type information—that almost all of these cases have had an early, successful resolution.

This all points out that the employers of this country, both public and private, are welcoming the veterans and the troops home. Although our staff is prepared, they're ready, we're meeting almost all of the Reserve and Guard members at the demobilization site with a briefing and offer of assistance and other information that they may need, all of this amounts into a very timely carrying out of our responsibilities.

Right now, in the sense of Desert Shield and Desert Storm, we're thinking in terms of doing it immediately and frankly, it will be several months before I have data on the backlog of cases or how many cases have gone into a prolonged status. It appears right now that is a very positive situation.

[Subsequently, the Department of Labor furnished the following information:]

The average length of time that elapses between the opening of a case and the closing of that case is only 50 days. This compares with our timeliness standard of seeking administrative closure in 90 days. The 50 day figure is attributed to substantial training provided to our field staff and their commitment to the program.

Chairman CRANSTON. Can you tell me how many cases you have now that are over 1 year old?

Mr. COLLINS. I would prefer to respond to that in writing since that is a precise number which I don't have with me.

Chairman CRANSTON. All right, do that.

Mr. COLLINS. I could guess at it but certainly those cases that are over a year old usually result from some complications indicating that they've gone into a form of litigation or some hangups in the investigative process. Certainly, I will say this very strongly, nothing to do with the competence, training and ability of our field staff.

Chairman CRANSTON. I would appreciate it if you'd give me that for the record.

[Subsequently, the Department of Labor furnished the following information:]

We have seven cases that are over 1 year old. This represents the lowest figure we have had in many years This is due to the emphasis we have placed on reducing the number of old cases to a minimum level. Our goal, of course, is to reduce the figure even further so that there are no cases over 1 year old.

Chairman CRANSTON. Another matter you may want to supply for the record, how many cases do you normally have in litigation and how long on average does litigation take?

Mr. COLLINS. The number, Mr. Chairman, is relatively low but I would be pleased to respond to that in writing to have a precise number.

Chairman CRANSTON. All right.

[Subsequently, the Department of Labor furnished the following information:]

We normally have about 40 cases in litigation. These 40 cases represent those we forward to the Department of Justice with a recommendation to litigate based on our view that they have merit and are valid claims. Further, an additional 15 cases are referred to the Department of Justice with a "no merit" recommendation.

On the average, we estimate that litigation efforts take approximately 250 days. This figure was derived from a sample of cases from October 1, 1989 to May 30, 1991 of cases referred to the Department of Justice for litigation that they reported closed. It represents the amount of time that the Department of Justice needs to settle or to litigate a complaint, since it does not include complaints for which representation by the Department of Justice was declined.

Chairman CRANSTON. What plans do you have for the prompt handling of cases if the law is indeed amended as proposed in S. 1095?

Mr. COLLINS. I didn't understand the question, Mr. Chairman.

Chairman CRANSTON. What plans do you have to implement the law if we enact it in regard to prompt handling of cases?

Mr. COLLINS. Well, Mr. Chairman, as I just said, our mission is to handle cases promptly and we're very proud of having that capability in carrying out that mission. We encourage the Department of Labor and our veterans employment representatives primarily in each State Veterans Employment Service Office are the people primarily responsible for hearing complaints. So through our public information campaign, which is underway and very successful, we are trying to advertise to employers—very important—as well as the Reserve and Guard members, and employees, to call the Veterans Employment and Training Service. You will get an immediate response.

So we're thinking right now in terms of immediate responses and immediate investigations and immediate actions. So far in the survey information I have on Desert Storm, it's working that way. So the answer to the question of how we will implement case processing time, it will be very prompt.

Chairman CRANSTON. Let me ask you simply to take a look at the provisions in S. 1095 and respond in writing as to how you would implement them if we enact them.

Mr. COLLINS. Yes, sir. Thank you, Mr. Chairman.

[Subsequently, the Department of Labor furnished the following information:]

We intend to act promptly to implement the new Act, while maintaining our current effectiveness in handling cases promptly. Our plans include the development of regulations, and refinement of existing guidance, such as the "VRR Handbook," to reflect new provisions of the law. Our plans also include training of staff who handle VRR cases, development of materials for use by both the uniformed services and employers to clarify its provisions. We also intend to continue efforts to secure the facts regarding a complaint and negotiate a resolution as early as practicable with a view toward reducing our current average processing time (50 days) for complaints.

Chairman CRANSTON. I realize that all of you and the other witnesses have had S. 1095 only for a short period of time and that upon further review of the bill, or based on the testimony of others here today, you may have comments in addition to the testimony you're submitting today.

I welcome further input and would just ask you submit any additional comments to the Committee as soon as you can. There are still some issues to resolve in the bill and I appreciate your help in trying to work them out.

Mr. **Duncan**. Mr. Chairman, could I make one last comment?

Chairman **Cranston**. Yes.

Mr. **Duncan**. Because of your sensitivity and ours too on this issue on the return of reservists, let me just simply note for the record that even last week, we had an additional 15,000 reservists return home. Secretary Cheney has already testified that the vast majority of the reservists who've been called should be home by the 4th of July.

Chairman **Cranston**. Good. Glad to end with that note.

Thank you very much.

Our next witness is Frank Nebeker, accompanied by Robert F. Comeau. There will be a brief recess while they come to the table.

[Recess.]

Chairman **Cranston**. Senator Daschle, do you have any opening statement to make?

Senator **Daschle**. No, I don't. Thank you, Mr. Chairman.

Chairman **Cranston**. I'm delighted to welcome once again, Frank Nebeker, Chief Judge of the U.S. Court of Veterans Appeals, accompanied by Robert Comeau, Clerk of the Court. We welcome you both and Frank, would you proceed and try to do it in 5 minutes, please?

STATEMENT OF HON. FRANK Q. NEBEKER, CHIEF JUDGE, U.S. COURT OF VETERANS APPEALS, ACCOMPANIED BY ROBERT F. COMEAU, CLERK OF THE COURT

Judge **Nebeker**. Thank you, Mr. Chairman. It's good to see you again. I indeed shall confine my comments to less than that time.

Before making comments, I want to say that the Court appreciates your courtesy in your prompt consideration of S. 1050, the bill to provide the authority of the Court to receive gifts, both in terms of service and channels. We feel that is necessary and can anticipate that in the future such a provision will prove necessary.

As to section 4 of H.R. 153 dealing with discipline, I can state that over the 20 odd years that I have been in contact with State Appellate Judges, they have told me that they found their own State legislatures are always willing to devote effort and money to the education and discipline of judges on a presumption that it is needed. That assumption probably applies to this body as well and indeed, we welcome the thoughts and the purpose behind the disciplinary provisions. It's necessary, as we see it, to maintain public confidence in the integrity of an accountable judiciary.

Without the enactment of the provisions of section 4 of H.R. 153, we believe the Court, as an article I court, does not have the clear authority to consider disciplinary matters when they are raised.

We're prepared to move forward with implementing section 4 and have but one caveat and an observation with respect to it as is outlined in greater detail in my formal written testimony.

As presently drafted, the Court itself will consider disciplinary matters that are raised before it. There is no review beyond the Court and it very well may be that it's a wise idea to have review beyond. After all, there are two people involved in a disciplinary complaint—the individual complaining and the judge complained of.

Whichever way the Court resolves the case, whether it be in favor of the judge or in favor of the complaint, one would say well, the losing side ought to have an opportunity for some kind of review to insure there has been an objective approach taken.

It's true that the President has the authority under the present Judicial Review Act to remove for misconduct. This disciplinary provision would obviously dovetail so that if misconduct is found, the matter could be referred to the President for such action as he deems appropriate.

That is not unlike what is done under the Ethics in Government Act for presidential appointees where the Director of the Office of Government Ethics finds misconduct by a presidential appointee, then the matter is simply referred over to the President for such action as he wants to take. It's not a formal review process in any sense of the word.

A review process could be established. I'm not prepared at this juncture to make any recommendations with respect to where review ought to go. Indeed, I certainly wouldn't recommend without the benefit of the views of the Judicial Conference of the United States, that review ultimately wind up with that body. I think that's a matter for them and perhaps for the Senate Judiciary Committee to consider because it would no doubt entail amendment to provisions of title 28 affecting the judiciary generally.

In conclusion, I would like to thank you for this opportunity to present the Court's comments, but I would add two comments with respect to objections that are made to some of the technical amendments.

I understand there is an objection to the repeal of the findings of fact and conclusions of law requirement that presently exist in the Judicial Review Act. I will remind the Chairman and the Committee that we've discussed on numerous instances in the past that that provision really has no place in a statute creating an appellate court.

By the other terms of the Judicial Review Act, our Court may not find fact, we may not grant a trial de novo on factual issues that are determined. The limitation on factual issues on review is whether factual determinations are clearly erroneous. That is a question of law, not a finding of fact.

So a requirement that the Court have a duty to articulate its findings of facts in its decision is really a square peg, I submit, in a round hole for us. There is nothing insidious in our request to have that eliminated or repealed. We simply suggest that in the interest of recognizing, as the rest of the act does, the true appellate nature of the Court, that provision is incongruous and ought really to be eliminated.

There is no question but what the Court will, as it does, continue to express its reasons for its decision. That is necessary to facilitate further review and there is really no question about the Court becoming rather arbitrary in terms of its dispositions. Even in the short ones, we take pains to point out the basis for it.

I fail to understand any objection to our having a judicial conference separate and apart from the Federal Judicial Conference. We're asking for it because nonlawyers are not able en masse to be members of the Federal Judicial Conference. We, therefore, would like our own to benefit the veterans' service organizations and their nonlawyer staffs so that they can attend a judicial conference at which we can consider their concerns in the administration of this kind of justice.

Thank you, Mr. Chairman.

[The prepared statement of Judge Nebeker appears on p. 201.]

Chairman **CRANSTON**. Thank you very much.

As you know, the Paralyzed Veterans of America, among others, are concerned about the last point you brought up.

Judge **NEBEKER**. Yes.

Chairman **CRANSTON**. What is your response to the assertion that elimination of the requirements contained in section 4067(b) would result in appellants having less due process protection than they have under current law?

Judge **NEBEKER**. I would respond that they are not entitled, as a matter of due process under the act as a whole, to articulation of findings of fact by the Court. That simply is an impossibility. We do not find fact. So one cannot say that the veteran is entitled to an articulation of those findings by the Court. Clearly, he is entitled to such an articulation by the Board of Veterans' Appeals and it is at that level that we are enforcing the reasons or basis requirement of the law that it be articulated at that level.

Ours, I repeat, is a purely review function. We have no business finding fact and I'm reasonably confident that if they think about it, the veterans community doesn't want our Court to be finding fact because that means another trial.

Chairman **CRANSTON**. Where a case is decided summarily by reference to an earlier decision or decisions, could you adopt a practice of providing the appellant with a copy of the earlier decision or decisions?

Judge **NEBEKER**. There is no question about that. Yes, that can be done. We are in the hinterland here before our opinions are going to be publicly and readily available throughout the Nation. As soon as that issue can be resolved—and it is rapidly coming to resolution—I think there will be no difficulty with respect to that.

Chairman **CRANSTON**. If you would do that, that would be fine.

Among the first letters you wrote to me after your confirmation and before any other nominations to the Court were made, was a June 19, 1989 letter indicating your view that "The Associate Judges on the Court of Veterans Appeals should be paid the same salary as the Chief Judge." Would you please explain when you decided this would be a good idea and what your reasons are?

Judge **NEBEKER**. Yes, I'd be happy to.

As the law presently stands with respect to this Court, it is the only Federal court in the United States, and probably the only court in the United States, where the Associate Judges who are performing the same judicial functions as the Chief Judge are receiving substantially less pay.

As you said, Mr. Chairman, in your opening statement with respect to this Court, you "hold a strong belief that the Court should be like all other Federal courts" and the purpose for my recommendation at the very early stages was precisely that. It, if you will, is sort of an equal pay for equal work requirement. They are performing the same functions judicially that I perform and I maintain they're entitled to the same pay.

Incidentally, as you have observed, the other Federal courts are at the level that the bill purports to place the pay of the Associate Judges of our Court on a par with the Court of Military Appeals. My understanding has been all along that the veterans community was viewed as entitled to the same kind of a day in court with the same relatively statured court as the other Federal courts. It is consistent with that notion that I have made the request.

Chairman CRANSTON. Thank you very much. I have no further questions and I appreciate seeing you again.

Judge NEBEKER. It's a pleasure to come and see you, sir. I'm glad to see that you're in good health.

Chairman CRANSTON. Thank you very much.

We now have a panel from the VA, the Honorable D'Wayne Gray, Chief Benefits Director, accompanied by Grady Horton, Director of Education Service; Dean Gallin, Deputy Assistant General Counsel; and also Mr. Ronald Cowles, Deputy Assistant Secretary for Personnel and Labor Relations.

Welcome to you. I want again to ask you to summarize your testimony in not more than 5 minutes. The entire statement will be appear in the record.

D'Wayne, as always, we're delighted to have you before us. Would you please proceed?

STATEMENT OF D'WAYNE GRAY, CHIEF BENEFITS DIRECTOR, DEPARTMENT OF VETERANS AFFAIRS, ACCOMPANIED BY GRADY HORTON, DIRECTOR, EDUCATION SERVICE; DEAN GALLIN, DEPUTY ASSISTANT GENERAL COUNSEL; AND RONALD COWLES, DEPUTY ASSISTANT SECRETARY, PERSONNEL AND LABOR RELATIONS

Mr. GRAY. Thank you, Mr. Chairman, and may I say, first, that it's good to see you back and looking fit, sir.

Chairman CRANSTON. Thank you very much.

Mr. GRAY. Knowing you've got a lot of witnesses, I will be very brief.

The Department of Veterans Affairs supports S. 868, deferring to the Department of Defense on those matters that are properly under its purview. I think I probably need to elaborate no more on that.

With regard to our position as an employer of reservists and Guardsmen, we are very proud in the VA of our members who are part of the Guard and Reserve. We are proud of those some 3,200 of them who were called to active duty during this Gulf crisis. About half of them are back now; we're glad to have them back. We're looking forward to the return of the rest of them.

The Chairman just introduced the other members who accompany me here. My colleagues and I are prepared, Mr. Chairman, to try to answer your questions and those of the other members of the Committee.

[The prepared statement of Mr. Gray appears on p. 207.]

Chairman CRANSTON. Thank you very, very much. I like the brevity of your statement. We'll just go to questions now then.

Ron, I'm very concerned about the impact that the recent mobilization of Reserve and National Guard members has had and continues to have on VA health-care facilities. Can you tell us how many VA health-care personnel were activated as a result of Operation Desert Storm/Desert Shield?

Mr. COWLES. There were over 3,000 employees from Veterans Health Administration that were called up to active duty. The majority of those employees were health-care personnel. At one time, we had as many as 1,350 nursing personnel that had been called up.

As you had stated earlier in your statement, we continue to have 891 nursing personnel still on active duty and 212 physicians. I was, in fact, glad to hear from the earlier testimony that most of the reservists are due back by July 4. We'll be glad to see them back in our medical centers.

Chairman CRANSTON. Let me go to D'Wayne and then I'll go back to you, Ron. D'Wayne, what's been the impact of the callup on the Veterans Benefits Administration?

Mr. GRAY. Actually, Mr. Chairman, we were impacted very lightly in those stations where significant numbers relative to the size of the station were called up. The nature of our work allows us to transfer work, in some cases, electronically or by mail and have it done at other stations and in some cases, we sent in help teams from stations that were not so impacted.

The callup did not move the needle on the meter as far as VBA is concerned. It was the Veterans Health Administration I think that was impacted more seriously.

Chairman CRANSTON. D'Wayne, I have no further questions for you and if you want to leave to catch a plane, feel free to do so.

Mr. GRAY. You're kind, Mr. Chairman. Thank you very kindly, sir.

Chairman CRANSTON. Ron, how many of those have not returned to their VA positions? For the record, please break down the total and the categories of professions and occupations?

Mr. COWLES. I'd be more than happy to provide that for the record.

Chairman CRANSTON. Thank you.

I note that Reserve personnel are entitled to 90 days of recovery time from discharge to reinstatement. Does the number you will give us represent personnel still on active duty or will it include those who have left active duty but not returned to their VA assignments?

Mr. COWLES. Still on active duty, sir.

Chairman CRANSTON. Can you give me just a rough idea of how many are still on active duty?

Mr. COWLES. I can tell you with health-care providers, we have about 1,600. I would give you a rough estimate of probably another hundred perhaps that are not involved in health care that are still on active duty. We can go ahead and try to confirm and verify a more accurate number.

Chairman CRANSTON. We'd appreciate that.

[Subsequently, the Department of Veterans Affairs furnished the following information:]

Total Mobilized

VHA	3,042
VBA	74
VACO	31
General Counsel (field)	5
Acquisitions and Facilities (field)	5
NCS (field)	8
Canteen (field)	2
Public Affairs (field)	1
Total	3,168

Key Health Care Personnel—Total Mobilized

Physicians	301
Registered Nurses	993
LPN/LVN	218
Nursing Assistants	145
Dentists	46
Other Medical	519
Support Personnel	820
Total	3,042

Health Care Personnel Still Mobilized, May 24

Physicians	210
Registered Nurses	749
LPN/LVN	150
Nursing Assistants	103
Dentists	36
Other Medical	378
Support Personnel	541
Total	2,167

Chairman CRANSTON. Is there any ongoing communication between VA and the Department of Defense regarding a timetable for when VA might expect to have all of its health-care personnel back on the job?

Mr. COWLES. Not that I'm aware of, Mr. Chairman.

Chairman CRANSTON. Wouldn't it be a good idea to try to work that out with them?

Mr. COWLES. Absolutely.

Chairman CRANSTON. I have no further questions. Thank you very much.

Our next witness is Mr. Harold H. Bruff, Professor of Law, University of Texas.

Professor Bruff, let me say, is here at my request to respond to the Administration's opposition to our proposal to provide for the Office of Special Counsel to represent in the Federal courts individual reservists seeking to enforce reemployment rights against a Federal agency.

I thank you for being with us today. I know that you're presently at George Washington University Law School in this community. Would you please state your background briefly in relevant areas of constitutional law and then tell us whether you believe the provision in question is constitutional and very briefly give us your reason?

STATEMENT OF HAROLD H. BRUFF, REDDITT PROFESSOR OF LAW, UNIVERSITY OF TEXAS

Mr. **Bruff**. Thank you, Mr. Chairman.

I am currently the John Redditt Professor of Law at the University of Texas, a 1968 graduate of the Harvard Law School. I have been writing and teaching constitutional and administrative law for almost 20 years, and, I'm sad to say, the Government still isn't perfect.

I've been writing especially in separation of powers and that brings me to my interest in this bill and to my response to the Justice Department. I would like, if I may, to submit a written summary of my brief oral remarks so that the Department may respond to them for the Committee if it cares to.

[The prepared statement of Mr. Bruff appears on p. 213.]

Chairman **Cranston**. I appreciate that very much.

What's your response to the policy objections expressed by the Administration witnesses, that is, that the provision would create an unacceptable conflict of interest by allowing the Special Counsel Office lawyer to oppose a Department of Justice attorney representing a Federal agency?

Mr. **Bruff**. Let me begin with the premise that you mentioned earlier, Mr. Chairman, that it's important not to shortchange Federal civil servants who are veterans pursuing their reemployment rights against Federal agencies.

The bill before you provides for Justice Department representation for private employers or State employers in conflicts with their veterans, but something different has to be done for Federal civil servants.

I think that this bill instead of creating a conflict of interest relieves one, if one considers the alternative provisions that are used for State and private employers—that is, the Department of Justice is to provide representation for those veterans. I think it is perfectly competent for Congress to provide representation as well to Federal civil servants so that they won't be disadvantaged in pursuing their rights.

But I think it obvious that Congress cannot simply provide that the Justice Department shall represent both the agency involved and the private citizen, the Federal civil servant who is contesting the issue with the agency. That would, indeed, put the Justice Department on both sides of the case, as Mr. Schiffer mentioned earlier, and I think would be an unacceptable conflict of interest.

This bill uses an independent agency—the Office of Special Counsel—to provide that lawyerly service and I think that this is an exactly correct use of independent functions because what it does is to provide that the executive branch will provide in its usual way for defense of the agency, but for defense of the individual who is adverse to the agency, we have an independent officer—the Office of Special Counsel—providing that service.

So I think that use of the provision here instead of creating a conflict of interest relieves one in a way similar to the Ethics in Government provisions for independent counsels that were upheld in *Morrison* v. *Olson*.

I think also that there is no "constitutionally troubling impression" that the executive branch is taking both sides and I believe Mr. Schiffer essentially conceded this earlier because it should be obvious to all observers that OSC is not the Department of Justice. That is the point of creating it originally and having the independence provisions.

Finally, I note a minor point which is that unlike, for example, the provisions of the Ethics in Government Act that were upheld by the Supreme Court, this provision does not take part of the Department of Justice's prosecutorial discretion away. These are provisions for Federal civil servants to bring appeals. They make the decision. The Office of Special Counsel really provides representation that could occur anyway.

Chairman **Cranston**. Just to be clear on one point, you do not believe that the provision raises any constitutional problems?

Mr. **Bruff**. I think any time Congress uses an independent officer to perform any executive function, a constitutional inquiry is appropriate. I share with the Justice Department the belief that Congress, for both policy and constitutional reasons, should be very sparing in that device.

I think, though, that because this relieves rather than creates a conflict of interest, there is a sound justification and no serious constitutional objection to this bill.

Chairman **Cranston**. Thank you for that clear statement and thank you also for offering to provide in writing your views in a more formal way. I'd appreciate it if you would do that and we will provide copies to the Administration witnesses.

Mr. **Bruff**. Thank you, sir. I hope I was on time and under budget.

Chairman **Cranston**. Thank you very, very much, you were.

Our final witnesses this morning represent five veterans' service organizations: John Hanson from The American Legion; Robert Manhan from the VFW; Lennox Gilmer from DAV; Jonathan Gaffney from AMVETS; and Clifton Dupree from PVA.

I thank you for your presence. Your prepared statements will go in the record as if read. Would you please summarize each of you not more than 5 minutes the testimony you wish to emphasize.

John, would you please begin?

STATEMENT OF JOHN HANSON, DIRECTOR, NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION

Mr. **Hanson**. Thank you, Mr. Chairman, members of the Committee, for the chance for The Legion to present our views on several issues of importance to the Nation's veterans.

For the sake of brevity, I won't be speaking here about veterans reemployment rights. We have staff here to answer any questions if you do have questions on that.

The Legion commends the Committee for its work to protect education and employment rights for veterans. Beginning in November though, I'd like the Committee to know that The American Legion conducted a survey of large corporations in the United

States to find out about their policies affecting employees who were reservists and members of the National Guard.

Jim Hubbard, our Director of National Economics, is here and will answer questions if you have them. We'll also be glad to share that data with the Committee at your pleasure.

I'd like to use our time today to focus on an issue that we think is quite important to all veterans, especially the men and women who served in the Persian Gulf War. It's come to our attention during the past few years that the people who serve in the military today are not receiving anywhere near the benefits that were given to their parents and their grandparents, especially education benefits.

Veterans participating in today's Montgomery GI Bill receive about 42 percent of the average cost of attending school at a State-run college or university. Veterans of Vietnam receive in excess of 95 percent on average and earlier veterans did even better. Today's veterans do not only receive less, but in order to get the full benefit at all, they have to contribute $1,200.

Don't get us wrong, the Montgomery GI Bill is better than nothing, but today it's just barely better than nothing. The improvements proposed by you are the very least that should be made at this time.

We are proposing that a new program which realistically reflects the cost of education be put into place for veterans. Under our plan, Desert Shield and Desert Storm veterans, those who served between August 2, 1990 and whenever the end of the period will be set, will receive $777 per month in education benefits. That's the amount set by the Congressional Research Service as being equal to the benefits received by Vietnam veterans.

In addition, these veterans will be automatically eligible for the benefits without having to contribute any money to the fund. This amount will be a base level for a single veteran with no dependents and will be adjusted annually.

To be eligible, a veteran would have to have served 90 days on active duty or to be called to active duty from the National Guard or Reserves for any amount of time beginning on August 2, 1990.

It will also make some improvements in the Montgomery GI Bill. First, benefit levels for Montgomery GI Bill beneficiaries will be raised to the base level of $777 per month and furthermore, the benefits will be provided without requiring any of the currently required reductions in pay. In other words, veterans will no longer be required to make a financial contribution in order to receive their GI bill education benefits.

If they have made any contributions, our proposal would provide for a restitution in the form of nontaxable readjustment assistance in any amount which their basic pay was reduced since August 1, 1990.

Pre-Persian Gulf War veterans who elected not to participate in chapter 30 will now be deemed to have elected to receive assistance and those who didn't participate will have their basic entitlement reduced by $50 a month until the reductions in educational assistance are equal to the amount their pay would have been reduced prior to August 1.

Mr. Chairman, you know how valuable the original GI bill has proven to be. It's never cost the Government money really because by the Government's own estimates, the return in increased income taxes and productivity provided by GI bill participants has been on the level of about 20 times the Government's initial investment.

We can't find many other Federal programs with that kind of return on investment. That's a budget-driven example at a time when we're asking that you not make decisions about veterans benefits based on budget-driven ideas. This isn't about return on investment; this is more about equity and we feel that we can't, as a Nation, afford to offer only a token benefit now when the men and women who served agree to do so with honor and distinction.

Thank you again, Mr. Chairman, for the opportunity to be here and for permitting our entire statement to be submitted for the record.

[The prepared statement of Mr. Hanson appears on p. 215.]

Chairman **Cranston**. Thank you very much, John.

Let me say that I thank you first for that testimony. Second, we'd like to have the information that The Legion has collected regarding the responses to the Guard and the Reserve calls. That would be very helpful to us.

Mr. **Hanson**. Thank you, sir. We'll be glad to do it.

[The survey referred to appears on p. 222.]

Chairman **Cranston**. Bob.

STATEMENT OF ROBERT MANHAN, SPECIAL ASSISTANT, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. **Manhan**. Thank you very much, Mr. Chairman.

It's my pleasure to represent the almost 3 million members of the Veterans of Foreign Wars. Our statement is already a part of the record. Therefore, I'll highlight in my 5 minutes only where we have some questions or differences on the bills.

First of all, VFW strongly supports S. 868 as proposed. I'll then go to S. 1095, the Uniform Services Employment and Reemployment Rights Act of 1991. We have two comments. The first one deals with section 4324. VFW would like to see those employees who may be working for either the Federal legislative and/or judicial branches of Government, and/or who may be National Guard technicians, enjoy the same reemployment rights as those employees who presently work for the Federal executive branch of the Government. We plead our case as a matter of both proprietary and equity.

The next issue regards section 4325. As we first looked at it, we thought the language in the bill was saying that an employee who was called up to active duty could request that his employer-sponsored health insurance program be maintained for a period of up to 18 months.

We are not certain that the employer is absolved of having to pay any portion of the ongoing health benefits package. If, in fact, the language is intended to say that the employee called to active duty will pay 100 percent of the entire benefit—the employee portion and the employer portion—then the VFW has no objection to the language as contained in the present bill.

Perhaps it might benefit others if that language were clarified.

The last bill is H.R. 153, the technical amendments to the Veterans Judicial Review Act. We are certainly one of the veterans organizations who would like to see subsection (b) of section 4067 retained. We think it's a courtesy that any judicial office should extend to any citizen, particularly a veteran, to know why his appeal was denied.

It can also help the veteran exercise another right that he has, to further appeal his case to the next higher judicial authority.

Along the same lines, the VFW would like to see both paragraphs (1) and (2) of subsection (d) of section 4067, retained. That is, we like the idea from a veteran's point of view that the court would retain both the single judge panel and the panel of judges for very obvious reasons. It works to the veteran's advantage.

Last, the new section 4086, which is an expansion and deals with the Judicial Conference of the Court of Veterans Appeals, we would like our representatives of our national office and/or our people who also practice before the Court, to be part of any type of a body that will sit around and discuss how best to improve the procedures and/or be involved in any changing administrative parameters.

Of course since I prepared the statement, I've had the benefit of listening to Judge Nebeker's comments on this topic and perhaps these amendments can be further amplified or expanded to add another type of a conference between Federal judges and those people who practice before them to insure that the veteran community interests are kept to the forefront.

This summarizes our position. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Manhan appears on p. 241.]

Chairman **Cranston**. Thank you.

Len.

STATEMENT OF LENNOX E. GILMER, ASSOCIATE NATIONAL EMPLOYMENT DIRECTOR, DISABLED AMERICAN VETERANS

Mr. **Gilmer**. Thank you, Mr. Chairman.

On behalf of the more than 1.4 million members of the Disabled American Veterans and its Ladies Auxiliary, I'm pleased to appear before you today to present our views on the four bills pending before this Committee.

We have submitted written testimony for the record and I will summarize that testimony here.

We want to begin by expressing our appreciation to this Committee for its continuing concern over the employment rights of our Nation's veterans. Before I address the pending bills, permit me to offer an observation that may be more appropriate for a later oversight hearing.

As the Persian Gulf War winds down and while our troops are beginning to be demobilized, the Administration has focused almost exclusively on reemployment rights and has not addressed employment security staff, including local veterans employment representatives. In fact, the Administration has proposed the decimation of the Disabled Veterans Outreach Program.

At the same time, employment service personnel are being taken out of their offices to support much needed transition assistance programs for separating military personnel. In fact, the Administration's 1992 budget request proposes reducing by over 75 percent the DVOP program staffing levels established by statutory formula from the already reduced staff of 1,885 to 438 staff beginning January 1992. The DVOP personnel have been the primary source of staff for the recently initiated TAP program.

An additional concern, Mr. Chairman, is that many reservists and National Guardsmen called up to serve in the Persian Gulf will not be entitled to be served as veterans through the nationwide network of job service offices because they do not meet the required periods of service. We believe these individuals should be accorded veteran status for the benefits provided through chapter 41 of title 38 of the United States Code.

We also suggest you amend section 2010(a) of title 38, United States Code. That section currently provides for studies of unemployment among special disabled veterans and among veterans who served in the Vietnam theater of operations during the Vietnam era. We suggest a new subsection (c) be added as follows: "On an annual basis, a study will be conducted of unemployment among special disabled veterans and veterans who served in the Persian Gulf theater of operations."

Historically, military personnel, including reservists and Guardsmen with reemployment rights, have had little difficulty in exercising those rights. Currently, employers have been very receptive and responsive to their obligations according to most news accounts. Reportedly, many employers have gone beyond statutory requirements to assure their valued employees who have made a commitment to serve our country are cared for.

By way of example, we point to the Office of Personnel Management. We cannot say enough to express our appreciation for the Federal reemployment rights initiatives advanced by the Director of OPM, Ms. Constance Newman and her Deputy Director, Bill Phillips.

I'd like to discuss S. 1095 now, the Uniform Services Employment and Reemployment Rights Act of 1991 proposing the complete rewrite of chapter 43 of title 38, United States Code.

At the outset, Mr. Chairman, you should be aware that the provisions and intent of S. 1095 are generally supported by the DAV and our testimony contains certain recommendations that, in our view, serve to further strengthen the proposed intent of the bill.

Mr. Chairman, this measure in section 4321 would provide protections against discrimination for a person who performs, has performed, or applies to perform in a uniform service. It is not clear to us if "applies to perform" means an application to enter the Reserves or is currently in the Reserves and applies for active duty. We urge clarification of the intent of the language so as to avoid confusion at some later date.

Section 4322(c) provides exceptions to the requirement of not more than 5 years of service to be eligible for reemployment rights. We urge an amendment to subparagraph (2) as follows: After the word "person," add "including a disability, injury or disease incurred while serving on active duty." This language will insure that those injured and retained in the service for treatment will be granted an exception to the 5 year limitation if necessary.

Mr. Chairman, section 4322(d)(2) provides additional time for certain disabled veterans to report back to that person's employer for work. This is very important and has the full support of the DAV. We encourage a process be developed whereby the employer, the vocational rehabilitation specialist or counseling psychologist, and in some cases, a DVOP, form a staffing team to meet with the veteran to begin the rehabilitation and reasonable accommodations process. This should be done as soon as possible even while the veteran is still hospitalized.

Section 4323 appears to allow an employer to make a determination about the qualification of the individual to be reemployed. Subsection (a)(1)(B) states, in part, "if not qualified to perform the duties of a position." We believe clarification is needed to guard against any employer abuse and suggest report language be included to emphasize the Department of Labor retain authority to determine qualifications for reemployment.

Mr. Chairman, we support section 4324, in part, because we believe strongly that all veterans should be entitled to similar reemployment rights, whether they be Federal, State or local government or private sector employees. We note that the Department of Justice objections to the Office of Special Counsel providing representation before the Merit Systems Protection Board appear to have no legal foundation, at least as it relates to their statement this morning.

There was a provision in the House bill that provided for civil penalties for employers who failed to provide reemployment rights to veterans. We urge that a similar provision be put into this bill.

Additionally, we'd note that we have no objection to S. 1050 and that we are generally in support of S. 153 in its present form.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gilmer appears on p. 249.]

Chairman CRANSTON. Thank you very much, Len. I want you to know that I'm working hard to get full funding for DVOPs and LVERs in the coming fiscal year.

Mr. GILMER. Thank you.

Chairman CRANSTON. Jon, before you begin, let me welcome you back, as a reservist who was called up for Operation Desert Storm and is now back. How did you manage to get out and back so soon?

Mr. GAFFNEY. I was one of the fortunate few that got called just before the war started, whereas a lot of my peers were called up back in August, as Mr. Duncan mentioned earlier. So there's a lot of people who served a long, long time. You don't have to go overseas to serve the country and I guess a lot of these folks are still on active duty—a lot of physicians, unfortunately, nurses, administrators, they're all in Bethesda of all places, backfilling for people who went to the Middle East.

Chairman CRANSTON. Thank you.

STATEMENT OF JONATHAN GAFFNEY, NATIONAL LEGISLATIVE DIRECTOR, AMVETS

Mr. GAFFNEY. Thanks for giving AMVETS the opportunity to provide our insights into proposed legislation which would restore educational assistance entitlements to those members of the military, both active and reserve, who could not complete educational courses or programs utilizing these programs due to activation or transfer in support of Operation Desert Shield and Desert Storm, the legislation which would amend chapter 43 of title 38, United States Code, Veterans Reemployment Rights.

With regard to provision of educational entitlements, AMVETS sees no reason why legislation which would reinstate educational assistance entitlements to Operation Desert Storm and Desert Shield participants and the programs under chapters 30, 32 and 35 of title 10, and chapter 106 of title 10, should not be passed.

As an individual who benefited greatly from VA-administered educational benefits in the late 1980s while concurrently serving as an officer in the Naval Reserves, I couldn't fathom having my hard-earned educational benefits penalized in the event of a recall.

Furthermore, as a recently activated and demobilized Medical Service Corps officer serving as a casualty tracking officer out of Bethesda, I know firsthand numerous young men and women who were recalled in support of Desert Storm and Desert Shield, individuals who due to reasons ranging from transfer to the Kuwait theater of operations, transfer to naval hospitals in other parts of the United States, or simply rotating shifts, 12 hour shifts, out of Bethesda, that had to withdraw from higher education programs in which they were enrolled.

For many of them, the recall period—and for some it still exists—started at the beginning or during the fall of 1990 semester and continued through the now ending spring 1991 semester.

As Assistant Secretary Duncan mentioned as part of his testimony, it is the Department of Defense's intent to have the majority of Guard and reservists home and demobilized by July, which is almost close to a year from when they were called up. In light of these aspects, this education reinstatement package is not a lot to ask and certainly will send the right message to current members of the military—and something you pointed out earlier—particularly those people who are thinking about joining.

The VRR agenda of this hearing is an extremely important issue to AMVETS membership and we are pleased the Committee saw fit to finally address some of the more dated provisions of the law.

After careful review of the proposed changes to chapter 43, title 38, including review of the House legislation, AMVETS is pleased with some of the proposed revisions that have been made. First of all, we appreciate the clear delineation of the types of discrimination prohibited by the legislation as defined in section 4321, particularly the inclusion of such employment areas as promotion, retention and reemployment.

Second, the extension of the reemployment rights from a period of 4 years to 5 years as well as the standardization of the return period for a servicemember to an employer will help to not only make it easier for an individual to serve in the military, but will make the laws governing that service clearer and much easier to understand.

Third, we strongly endorse the inclusion of the provisions which grant the 2 year interval for return to an employer of a servicemember who was hospitalized due to a service-connected illness or injury. The current law is blatantly unreasonable.

Finally, AMVETS supports the language in this legislation which provides entitlement to reemployment rights, does not depend on timing, frequency, duration or nature of service. AMVETS has long been an opponent of those rare cases of reasonableness tests determining as servicemembers' rights and benefits.

While we have briefly touched upon some of the more pertinent provisions of this legislation, we want to go on the record again as supporting this entire piece of legislation and the efforts of this Committee and the House committee to bring this rewrite about.

We consider it fair, timely and truly reflective of the nature of the business in serving in the U.S. military in the 1990s.

Again, AMVETS wishes to express our sincere appreciation to the Committee for allowing us to provide our testimony this morning. As always, we stand by to provide you with any further information or support.

Thank you.

[The prepared statement of Mr. Gaffney appears on p. 265.]

Chairman CRANSTON. Thank you very much.

Finally, Clif.

STATEMENT OF CLIFTON E. DUPREE, ASSOCIATE LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA

Mr. DUPREE. Mr. Chairman and members of the Committee, it's a pleasure and personal privilege to appear today on behalf of the Paralyzed Veterans of America.

Mr. Chairman, PVA supports S. 868 as proposed. The programs authorized by chapter 35 have great significance for the members of the PVA and their families. Through this program dependents and spouses of severely disabled veterans can pursue an education without depleting their family savings or accumulating significant debt.

For the purposes of maintaining continuity and equality in the program, PVA opposes VA's legislative proposal to eliminate eligibility of stepchildren for chapter 35 survivors and dependents educational assistance.

In reference to the Uniform Services Employment and Reemployment Rights, S. 1095, Mr. Chairman, we want to thank you and the members of the Committee for your continuing concern over the employment rights of our Nation's veterans. We are very appreciative of the action taken in legislation to provide employment for those reservists who incur a disability while serving on active duty.

We strongly support the provisions contained in the bill which would allow disabled individuals up to 2 years hospitalization and convalescence before exercising his or her reemployment right options.

PVA strongly supports your provision of accommodation which certainly should be no less than that provided under current law contained in the American Disabilities Act of 1990.

PVA supports the provision which provides a Federal Government employee the same representation by the Office of Special Counsel before the Merit Systems Protection Board and judicial review of Board decisions as those provided persons employed by State and private employers.

In reference to H.R. 153, Veterans Judicial Review Act, PVA opposes the provisions contained in H.R. 153 which would provide that the Court shall include in its decisions a statement of its conclusions of law and determinations of factual matters. This is an important right for veterans and must be preserved in the law.

Veterans are entitled to know the reasons for the decisions of the Court. Quite simply, when a veteran seeks review from the Court, the veteran is entitled to be informed in language he or she can understand, the findings made by the Court, and the reasons for those findings.

While this information is naturally important to the veteran, it will be important for advocates of veterans. Veterans advocates will be severely hampered in their representational efforts if they cannot discover the reasons for past Court decisions. The development of a law by the Court is an important new phase in the law of veterans benefits. If the Court is not required to give reasons and legal basis for its decisions, it will be difficult to use its decisions for legal precedence and predict how the Court will rule in future cases.

It is a matter of extreme importance for organizations representing veterans in administrative and judicial proceedings. This provision is not a unique one for courts. The U.S. Claims Court which reviews Military Correction Board decisions regarding issues of pay is required by statute to state its conclusions of law and findings of fact. Additionally, every U.S. District Court, plus the Court of International Trade, are similarly charged.

H.R. 153 also proposes a new statutory provision under section 4086, title 38, United States Code that would authorize a Judicial Conference of the Court of Veterans Appeals. As explained in our written testimony, because the Court does not yet issue roles guaranteeing nonattorney practitioners full status before the Court, we oppose this provision as being premature.

In reference to S. 1050, PVA has no objection to this legislation which will allow the U.S. Court of Veterans Appeals to accept voluntary services, gifts and bequests.

Mr. Chairman, I would like to thank you again on behalf of the members of the Paralyzed Veterans for holding this hearing on these most important and timely matters. This concludes my testimony and I'll be happy to answer any questions you may have.

[The prepared statement of Mr. Dupree appears on p. 271.]

Chairman CRANSTON. Thank you very much.

You suggested that the legislation should require a disabled veteran to notify the employer that he or she is interested in returning to work. I'm concerned that to designate a required time in the statute might restrict reemployment rights to persons who within the allowable 2 year reporting time would make the decision to return to work but might fail to meet an established notice period. Does that prospect concern you?

Mr. **Gilmer**. Mr. Chairman, that prospect does concern us. I think a part of what we're trying to do here is balance the employer's needs against a disabled veteran's needs. If in fact the employer is not aware within some reasonable timeframe—in this case, up to 2 years—that the veteran wants to return to work, we think that's going to be difficult for him to accommodate the needs of that disabled veteran.

Chairman **Cranston**. What would be a reasonable time?

Mr. **Gilmer**. Well, I'm sorry, I can't offer that at this moment. I'd be glad to get back to you with that.

Chairman **Cranston**. If you would think about it and get back to us?

[Subsequently, Mr. Gilmer furnished the following information:]

DISABLED AMERICAN VETERANS,
NATIONAL SERVICE AND LEGISLATIVE HEADQUARTERS,
807 MAIN AVENUE, S.W., WASHINGTON, DC 20024,
March 17, 1992.

THE HONORABLE ALAN CRANSTON,
Chairman, Senate Veterans Affairs Committee,
414 Russell Senate Office Bldg.,
Washington, DC 20510.

DEAR SENATOR CRANSTON: We offer the following to clarify our May 23, 1991 testimony on S. 1095 before the Senate Veterans Affairs Committee.

During the hearing you asked how long an employer should be obligated to extend veterans' reemployment rights to a severely disabled veteran. The concern was that some disabled veterans may require extensive medical treatment with rehabilitation therapy or counseling before they could return to work. This treatment, therapy and counseling, in some cases, could easily exceed a year.

Our testimony proposed an in depth process that would involve the veteran, employer and a VA vocational counselor in the development of an Individual Employment Assistance Plan (IEAP).

We believe that putting off the development and implementation of an IEAP is detrimental to the rehabilitation of people with disabilities. Attachment to an occupation is stronger the less time a person is away from their job. Returning to work is more frightening the longer you are away from your occupation, especially if the interruption is the result of a disability. Thus, vocational rehabilitation is most effective when intervention is provided at the earliest possible date.

If the employer is to be invited into this process, he must receive some notification of the intent of the disabled veteran. We believe this process must begin within one year of the veteran's separation from service. For this reason, we believe the employer must be notified of the veteran's intent to return to work and be invited by the VA vocational rehabilitation counselor to participate in the development of the IEAP. The employer's veterans' reemployment rights obligations should cease two years from the severely disabled veteran's medical recovery.

Sincerely,

LENNOX E. GILMER,
Associate National Employment Director.

Chairman **Cranston**. Clif, do you agree?

Mr. **Dupree**. Yes, sir. One statement I'd like to add to that is the employer would be aware, I would assume, that the person was going to take a long period of time for recovery and the attempt was made to be reemployed and in that way, the employer and the employee would be working together during the rehabilitative process to see if it can happen. But if during the process the employee would not be able to return to work, at least the employer would be aware of the situation.

Chairman **Cranston**. If you would also give us for the record, your further thoughts on what you think would be an appropriate time period?

[Subsequently, Mr. Dupree furnished the following information:]

Return to Work After Disability

PVA prefers a provision which would provide for an extension of time limits by which an individual must report for reemployment by (1) up to one year if a person is hospitalized or convalescing from an illness or injury incurred during service; (2) up to two years if the individual is a special disabled veteran whose disability significantly impairs the veteran's ability to work and if the employee informs, in writing, the employer concerned of the individual's condition, an intention to return to employment, and the plans for rehabilitation; or (3) the employer should make this accommodation because of the circumstances which are beyond the individual's control.

Chairman **Cranston**. Although H.R. 1578 and S. 1095 have many substantive provisions that are similar, there are some significant differences between the two proposals. Some of you noted a few of those differences. It would be of great assistance to us if each of you would submit your views on all substantive matters on which the House and Senate bills are different. If possible, if you could get that to us by the close of business on May 31, that would be appreciated. To assist you, the Committee will provide you tomorrow with a listing of the differences we've identified. If you will give us your comments on that in writing by the 31st, I'd appreciate it.

Chairman **Cranston**. I have no further questions and that concludes our hearing. Thank you all very much for your attendance.

[Whereupon, at 11:35 a.m., the Committee adjourned, to reconvene at the call of the Chair.]

APPENDIX

II

102D CONGRESS
1ST SESSION

S. 868

To amend title 10, United States Code, and title 38, United States Code, to improve educational assistance benefits for members of the Selected Reserve of the Armed Forces who served on active duty during the Persian Gulf War, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 18 (legislative day, APRIL 9), 1991

Mr. CRANSTON introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

A BILL

To amend title 10, United States Code, and title 38, United States Code, to improve educational assistance benefits for members of the Selected Reserve of the Armed Forces who served on active duty during the Persian Gulf War, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. RESTORATION OF ENTITLEMENT TO EDUCATIONAL ASSISTANCE.

(a) CHAPTER 30 PROGRAM.—Section 1413 of title 38, United States Code, is amended by adding at the end the following new subsection:

"(f)(1) Notwithstanding any other provision of this chapter or chapter 36 of this title, any payment of an educational assistance allowance described in paragraph (2) shall not—

"(A) be charged against any entitlement of any individual under this chapter; or

"(B) be counted toward the aggregate period for which section 1795 of this title limits an individual's receipt of assistance.

"(2) Subject to paragraph (3), the payment of the educational assistance allowance referred to in paragraph (1) is the payment of such an allowance to an individual for pursuit of a course or courses under this chapter if the Secretary finds that the individual—

"(A) in the case of a member of the Selected Reserve, had to discontinue such course pursuit as a result of being ordered, in connection with the Persian Gulf War, to serve on active duty under section 672(a), (d), or (g), 673, or 673b, of title 10; or

"(B) in the case of a person serving on active duty, had to discontinue such course pursuit as a result of being ordered, in connection with such War, to a new duty location or assignment or to perform an increased amount of work; and

"(C) failed to receive credit or lost training time toward completion of the individual's approved education, professional, or vocational objective as a result of having to discontinue, as described in subparagraph (A) or (B), his or her course pursuit.

"(3) The period for which, by reason of this subsection, an educational assistance allowance is not charged against entitlement or counted toward the applicable aggregate period under section 1795 of this title shall not exceed the portion of the period of enrollment in the course or courses for which the individual failed to receive credit or with respect to which the individual lost training time, as determined under paragraph (2)(C) of this subsection.".

(b) CHAPTER 32 PROGRAM.—(1) Section 1631(a) of such title is amended by adding at the end the following new paragraph:

"(5)(A) Notwithstanding any other provision of this chapter or chapter 36 of this title, any payment of an educational assistance allowance described in subparagraph (B) of this paragraph—

"(i) shall not be charged against the entitlement of any eligible veteran under this chapter; and "(ii) shall not be counted toward the aggregate period for which section 1795 of this title limits an individual's receipt of assistance.

"(B) The payment of an educational assistance allowance referred to in subparagraph (A) of this paragraph is any payment of a monthly benefit under this chapter to an eligible veteran for pursuit of a course or courses under this chapter if the Secretary finds that the eligible veteran—

"(i) in the case of a member of the Selected Reserve, had to discontinue such course pursuit as a result of being ordered, in connection with the Persian Gulf War, to serve on active duty under section 672(a), (d), or (g), 673, or 673b of title 10; or

"(ii) in the case of a person serving on active duty, had to discontinue such course pursuit as a result of being ordered, in connection with such War, to a new duty location or assignment or to perform an increased amount of work; and

"(iii) failed to receive credit or training time toward completion of the individual's approved educational, professional, or vocational objective as a result of having to discontinue, as described in clause (i) or (ii) of this subparagraph, his or her course pursuit.

"(C) The period for which, by reason of this subsection, an educational assistance allowance is not charged against entitlement or counted toward the applicable aggregate period under section 1795 of this title shall not exceed the portion of the period of enrollment in the course or courses for which the individual failed to receive credit or with respect to which the individual lost training time, as determined under subparagraph (B)(iii) of this paragraph.

"(D) The amount in the fund for each eligible veteran who received a payment of an educational assistance allowance described in subparagraph (B) of this paragraph shall be restored to the amount that would have been in the fund for the veteran if the payment had not been made. For purposes of carrying out the previous sentence, the Secretary of Defense shall deposit into the fund, on behalf of each such veteran, an amount equal to the entire amount of the payment made to the veteran.

"(E) In the case of a veteran who discontinues pursuit of a course or courses as described in subparagraph (B) of this paragraph, the formula for ascertaining the amount of the monthly payment to which the veteran is entitled in paragraph (2) of this subsection shall be implemented as if—

"(i) the payment made to the fund by the Secretary of Defense under subparagraph (D) of this paragraph, and

"(ii) any payment for a course or courses described in subparagraph (B) of this paragraph that was paid out of the fund,

had not been made or paid.".

(2) Section 1631(a)(2) of such title is amended by inserting "in paragraph (5)(E) of this subsection and" after "Except as provided".

(c) CHAPTER 35 PROGRAM.—Section 1711(a) of such title is amended—

(1) by striking out "Each" and inserting in lieu thereof "(1) Each"; and

(2) by adding at the end the following new paragraph:

"(2)(A) Notwithstanding any other provision of this chapter or chapter 36 of this title, any payment of an educational assistance allowance described in subparagraph (B) of this paragraph shall not—

"(i) be charged against the entitlement of any individual under this chapter; or

"(ii) be counted toward the aggregate period for which section 1795 of this title limits an individual's receipt of assistance.

"(B) The payment of the educational assistance allowance referred to in subparagraph (A) of this paragraph is the payment of such an allowance to an individual for pursuit of a course or courses under this chapter if the Secretary finds that the individual—

"(i) had to discontinue such course pursuit as a result of being ordered, in connection with the Persian Gulf War, to serve on active duty under section 672 (a), (d), or (g), 673, or 673b of title 10; and

"(ii) failed to receive credit or training time toward completion of the individual's approved educational, professional, or vocational objective as a result of having to discontinue, as described in clause (i) of this subparagraph, his or her course pursuit.

"(C) The period for which, by reason of this subsection, an educational assistance allowance is not charged against entitlement or counted toward the applicable aggregate period under section 1795 of this title shall not exceed the portion of the period of enrollment in the course or courses for which the individual failed to receive credit or with respect to which the individual lost training time, as determined under subparagraph (B)(ii) of this paragraph.".

(d) SELECTED RESERVE PROGRAM.—Section 2131(c) of title 10, United States Code, is amended by adding at the end the following new paragraph:

"(3)(A) Notwithstanding any other provision of this chapter or chapter 36 of title 38, any payment of an educational assistance allowance described in subparagraph (B) of this paragraph shall not—

"(i) be charged against the entitlement of any individual under this chapter; or

"(ii) be counted toward the aggregate period for which section 1795 of title 38 limits an individual's receipt of assistance.

"(B) The payment of the educational assistance allowance referred to in subparagraph (A) of this paragraph is the payment of such an allowance to the individual for pursuit of a course or courses under this chapter if the Secretary of Veterans Affairs finds that the individual—

"(i) had to discontinue such course pursuit as a result of being ordered, in connection with the Persian Gulf War, to serve on active duty under section 672 (a), (d), or (g), 673, or 673b of this title; and

"(ii) failed to receive credit or training time toward completion of the individual's approved educational, professional, or vocational objective as a result of having to discontinue, as described in clause (i) of this subparagraph, his or her course pursuit.

"(C) The period for which, by reason of this subsection, an educational assistance allowance is not charged against entitlement or counted toward the applicable aggregate period under section 1795 of title 38 shall not exceed the portion of the period of enrollment in the course or courses for which the individual failed to receive credit or with respect to which the individual lost training time, as determined under subparagraph (B)(ii) of this paragraph.".

SEC. 2. DELIMITING DATE.

Section 2133(b) of title 10, United States Code, is amended by adding at the end the following:

"(4)(A) In the case of a member of the Selected Reserve of the Ready Reserve who, during the Persian Gulf War, serves on active duty pursuant to an order to active duty issued under section 672 (a), (d), or (g), 673, or 673b of this title—

"(i) the period of such active duty service shall not be considered in determining the expiration date applicable to such member under subsection (a); and

"(ii) the member may not be considered to have been separated from the Selected Reserve for the purposes of clause (2) of such subsection by reason of the commencement of such active duty service.

"(B) For the purposes of this paragraph, the term 'Persian Gulf War' shall have the meaning given such term in section 101(33) of title 38.".

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II

102D CONGRESS
1ST SESSION

S. 1050

To amend title 38, United States Code, to allow the United States Court of Veterans Appeals to accept voluntary services and gifts and bequests, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 14 (legislative day, APRIL 25), 1991

Mr. CRANSTON (by request) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

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A BILL

To amend title 38, United States Code, to allow the United States Court of Veterans Appeals to accept voluntary services and gifts and bequests, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ACCEPTANCE OF VOLUNTARY SERVICES AND GIFTS BY THE UNITED STATES COURT OF VETERANS APPEALS.

Section 7281 of title 38, United States Code, is amended by adding at the end the following new subsection:

"(i) The Court may accept and utilize voluntary and uncompensated (gratuitous) services, including services as authorized by section 3102(b) of title 5 and may accept, hold, administer, and utilize gifts and bequests of personal property for the purpose of aiding or facilitating the work of the Court. Gifts or bequests of money to the Court shall be covered into the Treasury.".

O

II

102D CONGRESS
1ST SESSION

S. 1095

To amend title 38, United States Code, to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services.

IN THE SENATE OF THE UNITED STATES

MAY 16 (legislative day, APRIL 25), 1991

Mr. CRANSTON (for himself, Mr. SPECTER, Mr. DECONCINI, Mr. GRAHAM, Mr. AKAKA, and Mr. DASCHLE) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

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A BILL

To amend title 38, United States Code, to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Uniformed Services Employment and Reemployment Rights Act of 1991".

SEC. 2. REVISION OF CHAPTER 43 OF TITLE 38.

(a) RESTATEMENT AND IMPROVEMENT OF EMPLOYMENT AND REEMPLOYMENT RIGHTS.—Chapter 43 of title 38, United States Code, is amended to read as follows:

"CHAPTER 43—EMPLOYMENT AND REEMPLOYMENT RIGHTS OF PERSONS WHO SERVE IN THE UNIFORMED SERVICES

"SUBCHAPTER I—PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

"Sec.
"4301. Purposes; sense of Congress.
"4302. Relation to other law; construction.
"4303. Definitions.
"4304. Honorable service required.

"SUBCHAPTER II—EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS

"4321. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited.
"4322. Reemployment rights of persons who perform service in the uniformed services.
"4323. Reemployment positions.
"4324. Special rules for reemployment by the Federal Government.
"4325. Seniority, insurance, and other employment rights and benefits.
"4326. Employee pension benefit plans.
"4327. Entitlement to rights and benefits not dependent on timing or nature of service.

"SUBCHAPTER III—ASSISTANCE IN SECURING EMPLOYMENT AND REEMPLOYMENT RIGHTS; ENFORCEMENT

"4331. Definition.
"4332. Assistance in securing reemployment or other employment rights or benefits.
"4333. Enforcement of rights with respect to the Federal Government.
"4334. Enforcement of rights with respect to a State or private employer.

"SUBCHAPTER IV—INVESTIGATION OF COMPLAINTS

"4341. Conduct of investigation; subpoenas.

"SUBCHAPTER V—MISCELLANEOUS

"4351. Regulations.
"4352. Severability.

"SUBCHAPTER I—PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

"§ 4301. Purposes; sense of Congress

"(a) The purposes of this chapter are—

2 "(1) to encourage nonregular and noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; and

"(2) to minimize the disruption to the lives of persons performing service in the uniformed services and to the lives of their former employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service under honorable conditions.

"(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the reemployment practices provided for in this chapter.

"§ 4302. Relation to other law; construction

"(a) Nothing in this chapter shall supersede, nullify or diminish any provision of Federal or State law (including any local law or ordinance), or any provision of a plan provided, contract entered into, or policy or practice adopted, by an employer, which establishes a right or benefit that is more beneficial to a person referred to in section 4301(a)(2) of this title than a right or benefit provided for such person in this chapter or is in addition to a right or benefit provided for such person in this chapter.

"(b) This chapter supersedes any State law or employer plan, contract, or policy or practice that would have the effect of limiting in any manner any right or benefit provided by this chapter, including any State law or employer plan, contract, or policy or practice that establishes a prerequisite to the exercise of any such right or the receipt of any such benefit that is not a prerequisite established by this chapter.

"(c) Nothing in this chapter shall be interpreted to limit in any way any of the rights conferred by the Americans with Disabilities Act of 1990 (Public Law 101–336; 42 U.S.C. 12101 et seq.).

"§ 4303. Definitions

"For the purposes of this chapter:

"(1) The term 'Attorney General' means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under this chapter.

"(2) The term 'benefit' or 'benefit of employment' means any advantage, profit, privilege, gain, status, account, or interest that accrues by reason of an employment contract or an employer practice or custom (other than wages or salary for work performed) and includes rights under a pension plan, insurance coverage and awards, rights under an employee stock ownership plan, any bonus, severance pay, any supplemental unemployment benefit, an entitlement to leave with or without pay, work hours, and the location of employment.

"(3)(A) Except as provided in subparagraph (B), the term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—

"(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;

"(ii) the Federal Government;

"(iii) a State; and

"(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph.

"(B) In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed.

"(4) The term 'Federal Government' includes the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, and a Government corporation (as defined in section 103(1) of title 5).

"(5) The term 'reasonable accommodation' has the meaning given such term in section 101(9) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(9)).

"(6) The term 'seniority' means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.

"(7) The term 'service in the uniformed services' means the performance of duty on a voluntary on involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty.

"(8) The term 'undue hardship' has the meaning given such term in section 101(10) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(10)).

"(9) The term 'uniformed services' means the Armed Forces and the commissioned corps of the Public Health Service.

"§ 4304. Honorable service required

"A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

"(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.

"(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.

"(3) In the case of service on active duty, a release of such person from active duty under other than honorable conditions, as characterized pursuant to such regulations.

"(4) A dismissal of such person permitted under section 1161(a) of title 10.

"(5) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.

"SUBCHAPTER II—EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS

"§ 4321. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

"(a) A person who performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that service or obligation.

"(b) An employer shall be considered to have denied a person initial employment, reemployment, retention in employment, promotion, or a benefit of employment by an employer in violation of this section if the person's service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can demonstrate that the action would have been taken in the absence of such service, application, or obligation.

"(c)(1) An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter.

"(2) The prohibition in paragraph (1) shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

"§ 4322. Reemployment rights of persons who perform service in the uniformed services

"(a) Subject to subsections (b) and (c), any person who is absent from a position of employment by reason of the performance of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—

"(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

"(2) except as provided in subsection (c) of this section, the cumulative length of the absence and of any previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

"(3) the person reports or submits an application to such employer upon completion of such service in accordance with the provisions of subsection (d).

"(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity, impossibility, or unreasonableness for the purposes of this subsection shall be made by the Secretary concerned and shall not be subject to judicial review.

"(c) A person referred to in subsection (a) shall be entitled to the rights and benefits referred to in such subsection even though the cumulative length of the person's absences from a position of employment with the employer by reason of service in the uniformed services exceeds five years if the absence which results in a cumulative absence in excess of five years is a result of the performance of—

"(1) service required to complete an initial period of obligated service;

"(2) service from which, through no fault of that person, the person could not obtain a discharge or release in time to prevent the cumulative absences from exceeding 5 years;

"(3) service required under section 270 of title 10 or section 502(a) or 503(a) of title 32 or required to fulfill additional training requirements determined by the Secretary concerned to be necessary for professional development or for completion of skill training or retraining;

"(4) service pursuant to—

"(A) an order to, or retention on, active duty under section 672(a), 672(g), 673, 673b, 673c, or 688 of title 10;

"(B) an order to, or retention on, active duty (other than for training) under any other provision of law during a war or national emergency declared by the President or by Congress;

"(C) an order to active duty (other than for training) in support (as determined by the Secretary concerned) of an operational mission for which personnel have been ordered to active duty under section 673b of title 10;

"(D) an order to active duty in support (as determined by the Secretary concerned) of a critical mission or requirement of the uniformed services; or

"(E) a call into Federal service under chapter 15 of title 10 or section 3500 or 8500 of such title; or

"(5) any other category of service specified by the Secretary of Labor, in consultation with the Secretary of Defense, in regulations prescribed pursuant to section 4351.

"(d)(1) Subject to paragraphs (2) and (3), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's return to a position of employment with such employer as follows:

"(A) In the case of a person who is absent from a position of employment for less than 31 days, by reporting to the employer—

"(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and a period for the safe transportation of the person from the place of that service to the workplace of the employer; or

"(ii) as soon as possible after the expiration of the period required under clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

"(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

"(C) In the case of a person who is absent from a position of employment for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 31 days after the completion of the period of service.

"(D) In the case of a person who is absent from a position of employment for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

"(2) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated by, the performance of a period of service in the uniformed services shall report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for employment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph) at the end of the period (not to exceed two years) that is necessary for the person to recover from such illness or injury.

"(3) A person referred to in subparagraphs (A) or (B) of paragraph (1) who fails to report to an employer within the time period referred to in such paragraph shall be considered to have failed to report for such work on schedule but may be treated by the employer no less favorably than the employer treats other absent employees pursuant to the employer's established policy or the general practices of the employer relating to employee absences.

"(e)(1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (d)(1) shall provide to the person's employer (upon the request of such employer) documentation to establish that—

"(A) the person's application is timely;

"(B) the person has not exceeded the service limitations set forth in subsection (a)(3) (except as permitted under subsection (c)); and

"(C) the person's entitlement to the benefits under this chapter has not terminated under section 4304 of this title.

"(2) Documentation of any matter referred to in paragraph (1) that is issued pursuant to regulations prescribed by the Secretary concerned shall satisfy the documentation requirements in such paragraph.

"(3) An employer shall reemploy in accordance with the provisions of this chapter a person who fails to provide documentation that satisfies the requirements prescribed pursuant to paragraph (2) if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in clauses (A) through (C) of paragraph (1), the employer of such person may terminate employment of the person and the provision of any rights or benefits afforded the person under this chapter.

"§ 4323. Reemployment positions

"(a) Subject to subsections (b) and (c), a person entitled to reemployment under section 4322 of this title upon completion of a period of service in the uniformed services shall be reemployed in a position of employment as follows:

"(1) In the case of a person who is not disabled—

"(A) in a position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a similar position of like status and pay, the duties of which the person is qualified to perform; or

"(B) if not qualified to perform the duties of a position pursuant to subparagraph (A), in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position with like status and pay, the duties of which the person is qualified to perform.

"(2)(A) In the case of a person who is disabled, one of the following positions in the order of priority in which the positions are listed:

"(i) A position referred to in paragraph (1)(A).

"(ii) A position referred to in paragraph (1)(B).

"(iii) A position similar to a position referred to in clause (ii) that is consistent with the circumstances of the person's case, the duties of which the person is qualified to perform.

"(iv) A position of lesser status and pay than a position referred to in clause (iii) that is consistent with the circumstances of the person's case, the duties of which the person is qualified to perform.

"(B) An employer shall employ a person in a position referred to in clauses (i) through (iv) of subparagraph (A) even if the employer must make a reasonable accommodation for the disability of such person (and any limitations related to such disability) to facilitate the person's ability to perform the duties of that position.

"(b) A person shall be considered qualified to perform the duties of a position of employment under subsection (a) if the person can perform the essential functions of the position or will be able to perform such functions (1) after receiving training provided by the employer to refresh or update the necessary skills of that person, or (2) through other reasonable efforts undertaken by the employer

"(c)(1) An employer is not required to reemploy a person under this chapter if the employer's circumstances have so changed as to make such reemployment impossible or unreasonable.

"(2) An employer is not required to make an accommodation under subsection (a) or provide training or undertake any other effort under subsection (b) if such accommodation, training, or effort would impose an undue hardship on the operation of the business of the employer to do so.

"(3) In any administrative or judicial proceeding involving an issue of whether (A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances, or (2) any accommodation, training, or effort referred to in paragraph (2) would impose an undue hardship on the operation of the business of the employer, the employer shall have the burden of proving the impossibility or unreasonableness or undue hardship.

"(d)(1) If 2 or more persons request reemployment under this chapter in the same position of employment by reason of an interruption of employment resulting from service in the uniformed services, the person whose continuous employment was so interrupted earlier shall be reemployed in that position.

"(2) Any person entitled to reemployment under this section who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:

"(A) In the case of a person who is not disabled, in any other position referred to in subsection (a)(1) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case.

"(B) In the case of a person who is disabled, in any other position referred to in subsection (a)(2) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case.

"§ 4324. Special rules for reemployment by the Federal Government

"(a) If the reemployment of a person under this chapter in a particular Federal Government position is not feasible, the Director of the Office of Personnel Management shall ensure that such person is offered an alternative position of employment in the executive branch that satisfies the requirements of section 4323(a) of this title.

"(b)(1) For the purposes of subsection (a), the Director of the Office of Personnel Management shall determine whether the reemployment of a person in a position in an executive agency, the United States Postal Service, or the Postal Rate Commission is feasible.

"(2) For the purposes of subsection (a), the Director of the Office of Personnel Management shall accept a determination that the reemployment of a person in a position described in paragraph (A) or (B) is not feasible from the official referred to in that subparagraph, as follows:

"(A) In the case of a position in the legislative branch or the judicial branch, the officer or employee authorized to appoint a person to that position.

"(B) In the case of a National Guard technician position in a State, the adjutant general of that State.

"(c) Subsection (a) does not apply to a person whose reemployment in a legislative or judicial branch position or in a position as a National Guard technician is not feasible if such person is not eligible to acquire a civil service status necessary for transfer to a position—

"(1) in the case of a person whose position of employment would be in the legislative or judicial branch, in the competitive service in accordance with section 3304(c) of title 5; or

"(2) in the case of a person whose position of employment would be as a National Guard technician, in the competitive service in accordance with section 3304(d) of such title.

"(d) A person's entitlement to reemployment under this section does not entitle such person to retention, preference, or displacement rights over any person who, without regard to the provisions of this chapter, has superior retention, preference, or displacement rights under the provisions of title 5 that relate to veterans and other preference eligibles (as defined in section 2108 of such title).

"§ 4325. Seniority, insurance, and other employment rights and benefits

"(a) A person who is reemployed under section 4323 or 4324 of this title shall be entitled to the same seniority such person would have had if the person's employment had not been interrupted by service in the uniformed services.

"(b) For the purposes of this section, a person who is reemployed pursuant to section 4323 or 4324 of this title in a position of civilian employment shall be considered to have been on a leave of absence while performing service in the uniformed services and shall be entitled to such rights and benefits provided to other employees of the employer who are on furlough or leave of absence under a plan, contract, or policy or practice in force at the beginning of the period of such service or which becomes effective during such period. Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to such plan, contract, or policy or practice.

"(c)(1) A person whose civilian employment with an employer is interrupted by service in the uniformed services shall, at such person's request, be covered by insurance provided by such employer for other employees of the employer during the period of such service. In no event shall such coverage be required to be provided for more than 18 months after the commencement of such service. Such person may be required to pay not more than 102 percent of any premium required of other employees for the continuation of any insurance coverage that is continued under this paragraph, except that a person who performs service in the uniformed services for less than 31 days such person may not be required to pay more than the employee share, if any, of the cost of such coverage.

"(2) In the case of a person whose coverage by an employer-offered health insurance as an employee is terminated by reason of the service of such person in the uniformed services, an exclusion or waiting period may not be imposed in connection with coverage of such person upon reemployment by the employer under this chapter, or in connection with any other person who is covered by the insurance by reason of the reinstatement of the coverage of such person upon reemployment, if—

"(A) an exclusion or waiting period would not have been imposed under such insurance had coverage of such person by such insurance not been terminated as a result of such service; and

"(B) the condition of such person has been determined by the Secretary not to have been incurred or aggravated in the line of duty in the military, naval, or air service.

"(d)(1) Subject to paragraph (2), a person who is reemployed in a position of employment by an employer under section 4323 or 4324 of this title may not be involuntarily removed from such position, except for cause—

"(A) within 180 days after the date of reemployment, if the total of the person's periods of employment by the employer before such reemployment was less than 48 months; or

"(B) within one year after the date of reemployment, if the total of the persons' periods of employment by such employer before such reemployment was more than 48 months.

"(2) For the purposes of paragraph (1), a person's period of employment with an employer shall include the period of such person's absences from such employment by reason of service in the uniformed services.

"(e)(1) Any person described in paragraph (3) whose employment with an employer referred to in that paragraph is interrupted by service in the uniformed services shall be entitled to use during such interruption any annual leave with pay accumulated by the person before the commencement of such service. A person shall use annual leave with pay under this paragraph by submitting a written request for such use to the person's employer before the commencement of such service.

"(2) Subject to the policy or practice of an employer referred to paragraph (1), a person referred to in such paragraph shall accrue annual leave with pay during the period of service that interrupts the person's employment with the employer and shall (upon the written request of the person) be entitled to use any leave accumulated by reason of such accrual.

"(3) A person entitled to the benefit described in paragraph (1) is a person who—

"(A) has accumulated annual leave with pay under a policy or practice of a State (as an employer) or private employer; or

"(B) has accumulated such leave as an employee of the Federal Government pursuant to subchapter I of chapter 63 of title 5.

"§ 4326. Employee pension benefit plans

"(a)(1) In the case of a right provided pursuant to an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974

(29 U.S.C. 1002(2)) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this subsection.

"(2)(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

"(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

"(b)(1) An employer reemploying a person under this chapter shall be liable to an employee benefit pension plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2). For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1145) or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement.

"(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are derived from employee contributions only to the extent the person makes payment to the plan with respect to such contributions. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B).

"(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(37)), under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide notice of such reemployment to the administrator of such plan.

"§ 4327. Entitlement to rights and benefits not dependent on timing or nature of service

"A person's entitlement to a right or benefit provided under this chapter does not depend upon the timing, frequency, or duration of the person's performance of service in the uniformed services or the nature of such service in the uniformed services.

"SUBCHAPTER III—ASSISTANCE IN SECURING EMPLOYMENT AND REEMPLOYMENT RIGHTS; ENFORCEMENT

"§ 4331. Definition

"For the purposes of this subchapter, the term 'wrongful personnel action' means the following:

"(1) In the case of a State (as an employer) or a private employer, an action taken by the employer in violation of a provision of this chapter or a failure by the employer to take an action required by the provisions of this chapter.

"(2) In the case of the Federal Government—

"(A) an action taken by an officer or employee of the Federal Government in violation of a provision of this chapter or a failure by such an officer or employee to take an action required by the provisions of this chapter; or

"(B) a failure of the Director of the Office of Personnel Management to take an action required of the Director under section 4324 of this title.

"§ 4332. Assistance in securing reemployment or other employment rights or benefits

"(a)(1) Any person who claims to have been subject to a wrongful personnel action may submit a complaint regarding such action to the Secretary of Labor

"(2) A complaint submitted under paragraph (1) shall be in a form prescribed by the Secretary of Labor and shall include—

"(A) the name and address of the employer or potential employer against whom the complaint is directed; and

"(B) a summary of the allegations upon which the complaint is based.

"(b) The Secretary of Labor shall investigate each complaint submitted to such Secretary pursuant to subsection (a). If the Secretary of Labor determines as a result of the investigation that the allegation of the wrongful personnel action in such complaint is valid, such Secretary shall make reasonable efforts to ensure that the individual named in the complaint complies with the provisions of this chapter.

"(c) If the efforts of the Secretary of Labor with respect to a complaint under subsection (b) are unsuccessful, the Secretary shall notify the person who submitted the complaint of—

"(1) the results of the Secretary's investigation;

"(2) the efforts made by the Secretary; and

"(3) the complainant's entitlement to proceed under the enforcement of rights provisions provided under section 4333 of this title (in the case of a person submitting a complaint against the Federal Government) or 4334 of this title (in the case of a person submitting a complaint against a State or private employer).

"(d) The Secretary of Labor shall carry out the responsibilities of such Secretary under this section through the Assistant Secretary of Labor for Veterans' Employment and Training.

"§ 4333. Enforcement of rights with respect to the Federal Government

"(a)(1) A person who receives a notification from the Secretary of Labor of an unsuccessful resolution of a complaint relating to a wrongful personnel action pursuant to section 4332(c) of this title may request that the Secretary of Labor refer the complaint for litigation before the Merit Systems Protection Board. The Secretary of Labor shall refer the complaint regarding such wrongful action to the

Office of Special Counsel established by section 1211 of title 5.

"(2)(A) If the Special Counsel determines that the allegation of a wrongful personnel action in such complaint is valid, the Special Counsel may initiate an action regarding such complaint before the Merit Systems Protection Board and, upon the request of the person submitting the complaint, represent the person before the Board.

"(B) If the Special Counsel decides not to initiate an action or represent a person before the Merit Systems Protection Board as authorized under subparagraph (A), the Special Counsel shall notify such person of that decision and the reasons for the decision.

"(b)(1) A person referred to in paragraph (2) may submit a complaint alleging a wrongful personnel action directly before the Merit Systems Protection Board. A person who seeks a hearing or adjudication under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

"(2) A person entitled to submit a complaint to the Merit Systems Protection Board under paragraph (1) is a person who—

"(A) has chosen not to apply to the Secretary of Labor for assistance regarding the complaint under section 4332(a);

"(B) has received a notification from the Secretary of Labor under section 4332(c) of this title;

"(C) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A): or

"(D) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B).

"(c)(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b)(1).

"(2) If the Board determines that an officer of the Federal Government has not complied with the provisions of this chapter relating to the reemployment of a person by the Federal Government, the Board shall enter an order requiring such officer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

"(3) Any compensation received by a person pursuant to an order under paragraph (1) shall be in addition to any other right or benefit provided for by this chapter and shall not be deemed to diminish any such right or benefit.

"(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to paragraph (1) that a person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

"(d) A person may petition the United States Court of Appeals for the Federal Circuit to review a final order or decision of the Merit System Protection Board that denies such person the relief sought. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

"(e) A person may be represented by the Special Counsel in an action for review of a final order or decision issued by the Merit Systems Protection Board pursuant to subsection (c) that is brought pursuant to section 7703 of title 5 unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.

"§4334. Enforcement of rights with respect to a State or private employer

"(a)(1) A person who has submitted a complaint of a wrongful personnel action by a State (as an employer) or a private employer to the Secretary of Labor pursuant to section 4332(a) of this title and who has received a notification of the unsuccessful resolution of the complaint under section 4332(c) of this title, may request that the

Secretary of Labor refer the complaint to the Attorney General. The Attorney General may commence an action for appropriate relief on behalf of such person in an appropriate United States district court. The Attorney General shall appear on behalf of, and act as the attorney for, the person in the prosecution of such action.

"(2)(A) A person referred to in subparagraph (B) may commence an action for appropriate relief in an appropriate United States district court.

"(B) A person entitled to commence an action for relief with respect to a complaint under subparagraph (A) is a person who—

"(i) has chosen not to apply to the Secretary of Labor for assistance regarding the complaint under section 4332(a);

"(ii) has chosen not to request that the Secretary of Labor refer the complaint to the Attorney General under subsection (a)(1); or

"(iii) has been refused representation by the Attorney General with respect to the complaint under such subsection.

"(b) In the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function. In the case of a private employer the appropriate district court is the district court for any district in which the private employer of the person maintains a place of business.

"(c)(1) The district courts of the United States shall have jurisdiction, upon the filing of a motion, petition, or other appropriate pleading by or on behalf of the person entitled to a right or benefit under this chapter to require the employer to comply with the provisions of this chapter and to require the State or private employer, as the case may be, to compensate the person for any loss of wages or benefits suffered by reason of such employer's wrongful personnel action. Any such compensation shall be in addition to, and shall not be deemed to diminish, any of the benefits provided for in such provisions.

"(2)(A) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

"(B) In any action or proceeding commenced by a person under subsection (a)(2) and in which such person is the prevailing party, the court may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

"(3) The court may use its full equity powers, including temporary or permanent injunctions and temporary restraining orders, to vindicate fully the rights of persons under this chapter.

"(4) An action under this chapter may be initiated only by a person claiming rights or benefits under the provisions of subchapter II of this chapter, and not by an employer, prospective employer, or other entity with obligations under this chapter.

"(5) In any such action, only the State, private employer, or potential employer (as the case may be) or, in the case of benefits described in section 4326 of this title, an employee pension benefit plan referred to in that section, shall be considered a necessary party respondent.

"(6) No State statute of limitations shall apply to any proceeding under this section.

"(7) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

"SUBCHAPTER IV—INVESTIGATION OF COMPLAINTS

"§ 4341. Conduct of investigation; subpoenas

"(a) In carrying out any investigation under this chapter, the Secretary of Labor shall have reasonable access to documents of the complainant or an employer that the Secretary considers relevant to the investigation. The Secretary may examine and duplicate such documents.

"(b) In carrying out investigations under this chapter, the Secretary of Labor may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and after a request by the Secretary of Labor, the Attorney General may apply to the district court of the United States for any district in which such disobedience or contumacy occurs for an order enforcing the subpoena.

"(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary of Labor or to comply with any order of such Secretary made pursuant to a lawful inquiry under this chapter. The district courts shall have jurisdiction to punish a failure to obey a subpoena or other lawful order of such Secretary as a contempt of court.

"SUBCHAPTER V—MISCELLANEOUS

"§ 4351. Regulations

"(a) The Secretary of Labor, in consultation with the Secretary of Defense, may prescribe regulations relating to the implementation of this chapter with respect to reemployment and the provision of other employment rights and benefits by States (as employers) and private employers.

"(b) The Director of the Office of Personnel Management (in consultation with the Secretary of Labor and the Secretary of Defense) may prescribe regulations relating to the implementation of this chapter by the Federal Government (as an employer). This subsection does not authorize the Director to prescribed regulations relating to the responsibilities or activities of the Merit Systems Protection Board or the Office of the Special Counsel under this chapter.

"§ 4352. Severability

"If any provision of this chapter, or the application of such provision to any person or circumstances, is held invalid, the validity of the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which the provision is held invalid, shall not be affected.".

(b) TABLE OF CHAPTERS.—The tables of chapters at the beginning of title 38, United States Code, and the beginning of part III of such title are each amended by striking out the item relating to chapter 43 and inserting in lieu thereof the following:

"43. Employment and reemployment rights of persons who serve in the uniformed services .... 4301".

(c) REVISION OF DEFINITION OF "STATE" FOR REEMPLOYMENT PURPOSES.—Section 101(20) of title 38, United States Code, is amended by adding at the end the following new sentence: "For the purposes of chapter 43, such term also includes Guam, the Virgin Islands, other possessions of the United States, and the agencies and political subdivisions thereof.".

(d) OUTREACH PROGRAM.—(1) Not later than 180 days after the date of the enactment of this Act, the Secretary of Labor, after consultation with the Secretary of Defense, the Secretary of Transportation, the Secretary of Health and Human Services, and the Secretary of Veterans Affairs, shall make available to veterans and persons who perform service in the uniformed services and the employers of veterans and such persons information relating to the reemployment and additional employment rights, benefits, and obligations of such veterans, persons, and employers under the provisions of such chapter.

(2) For the purposes of this subsection:

(A) The term 'veteran' shall have the meaning given such term in section 101(2) of title 38, United States Code.

(B) The term 'uniformed services' shall have the meaning given such term in section 4303(9) of title 38, United States Code (as added by subsection (a) of this section).

(e) REPORT RELATING TO IMPLEMENTATION OF REEMPLOYMENT RIGHTS PROVISIONS.—Not later than one year after the date of the enactment of this Act, the Secretary of Labor, the Attorney General, and the Special Counsel referred to in section 4333(a)(1) of title 38, United States Code (as added by subsection (a)), shall each submit a report to the Congress relating to the implementation of chapter 43 of such title (as added by such subsection).

SEC. 3. REPEAL OF TITLE 5 PROVISIONS RELATING TO REEMPLOYMENT RIGHTS OF RESERVISTS.

(a) REPEAL.—Subchapter II of chapter 35, title 5, United States Code, is repealed.

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of such chapter is amended by striking out the items relating to subchapter II and section 3551.

SEC. 4. CONFORMING AMENDMENTS.

(a) TITLE 38.—Section 5303A(b)(3) of title 38, United States Code, is amended—

(1) by striking our "or" at the end of clause (E);

(2) by striking out the period at the end of clause (F) and inserting in lieu thereof "; or"; and

(3) by adding at the end thereof the following new clause;

"(G) to reemployment benefits under chapter 43 of this title.".

(b) TITLE 5.—Section 1204(a)(1) of title 5, United States Code, is amended by striking out "section 2023" and inserting in lieu thereof "chapter 43".

(c) TITLE 10.—Section 706(c)(1) of title 10, United States Code, is amended by striking out "section 2021" and inserting in lieu thereof "chapter 43".

SEC. 5. TECHNICAL AMENDMENT.

Section 9(d) of Public Law 102–16 (105 State. 55) is amended by striking out "Act" the first place it appears and inserting in lieu thereof "section".

SEC. 6. TRANSITION RULES AND EFFECTIVE DATES.

(a) APPLICABILITY OF CHAPTER 43 TO PERSONS COMMENCING SERVICE AFTER DATE OF ENACTMENT.—

(1) AFTER 90 DAYS AFTER SUCH DATE.—The provisions of chapter 43 of title 38, United States Code (as added by section 2(a) of this Act), and section 5303A(b)(3)(G) of such title (as added by section 4(a) of this Act) shall apply to persons who commence the performance of periods of service in the uniformed services after the 90-day period beginning on the date of the enactment of this Act.

(2) WITHIN 90 DAYS AFTER SUCH DATE.—(A)(i) Subject to subparagraph (B), any person who

commences the performance of a period of service in the uniformed services during the 90-day period referred to in paragraph (1) shall be covered by the provisions of chapter 43 of title 38, United States Code (as added by section 2(a) of this Act), and section 5303A(b)(3)(G) of such title (as added by section 4(a) of this Act).

(ii) For the purposes of section 4322(a)(1) of such title (as so amended) a person referred to in clause (i) shall be deemed to have satisfied the notification requirement referred to in such section

(B) Any person referred to in subparagraph (A)(i) who completes the performance of service referred to in that subparagraph within the time period referred to in that subparagraph shall be covered by the provisions of chapter 43 of title 38, United States Code, in effect on the day before the date of the enactment of this Act.

(b) APPLICABILITY OF CHAPTER 43 TO PERSONS PERFORMING ACTIVE DUTY ON DATE OF ENACTMENT.—

(1) IN GENERAL.—(A) Subject to paragraph (2), any person who is performing service in the uniformed services on the date of the enactment of this Act shall be covered by the provisions of chapter 43 of title 38, United States Code (as added by section

2(a) of this Act), and section 5303(A)(b)(3)(G) of such title (as added by section 4(a) of this Act).

(B) For the purposes of section 4322(a)(1) of such title (as so amended) a person referred to in subparagraph (A) shall be deemed to have satisfied the notification requirement referred to in such section.

(C) For the purposes of calculating the cumulative length of service performed by a person referred to in this paragraph under section 4322(a)(2) of such title (as so amended), any service in the uniformed services (other than service referred to in section 4322(c) of such title (as so amended)) shall be included.

(2) ALTERNATIVE REPORTING REQUIREMENT.—Notwithstanding paragraph (1), a person referred to in subparagraph (A) shall report to work in accordance with the provisions of section 2024(d) of title 38, United States Code, in effect on the day before the date of the enactment of this Act.

(c) SPECIAL RULE FOR APPLICABILITY OF INSURANCE PROVISIONS.—Notwithstanding subsections (a)(2)(B) and (b)(1), a person referred to in such subsections shall be covered by the provisions of section 2021(b)(1) of title 38, United States Code (relating to insurance benefits), in effect on the day before the date of the enactment of this Act until the person has received notice of the provisions of section 4325(c) of such title (as amended by this Act) and has had a reasonable opportunity to elect to be covered by the provisions of such section 4325(c) (as so amended).

(d) REEMPLOYMENT OF DISABLED PERSONS.—

(1) IN GENERAL.—Section 4323(a)(2) of chapter 43 of title 38, United States Code (as amended by section 2(a) of this Act) shall apply to reemployments initiated on or after August 1, 1990.

(2) REPEAL.—(A) Effective as of August 1, 1990, section 2027 of title 38, United States Code (as in effect on the day before the date of the enactment of this Act), is repealed.

(B) Effective as of August 1, 1990, the table of sections at the beginning of chapter 43 of such title (as in effect on the day before the date of the enactment of this Act) is amended by striking out the item relating to section 2027.

(e) DEFINITION.—For the purposes of this section, the term "service in the uniformed services" shall have the meaning given such term in section 4303(7) of title 38, United States Code (as added by section 2(a) of this Act).

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II

102D CONGRESS
1ST SESSION

H. R. 153

IN THE SENATE OF THE UNITED STATES

FEBRUARY 26 (legislative day, FEBRUARY 6), 1991
Received

MARCH 7 (legislative day, FEBRUARY 6), 1991
Read twice and referred to the Committee on Veterans' Affairs

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AN ACT

To amend title 38, United States Code, to make miscellaneous administrative and technical improvements in the operation of the United States Court of Veterans Appeals, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PROCEDURES FOR DECISIONS OF THE COURT OF VETERANS APPEALS.

Section 4067 of title 38, United States Code, is amended—

(1) by striking out subsections (b) and (d);

(2) by redesignating subsections (c) and (e) as subsections (b) and (c), respectively; and

(3) by striking out "except as provided in subsection (d) of this section" in subsection (a).

SEC. 2. JUDICIAL CONFERENCE.

(a) IN GENERAL.—Subchapter III of chapter 72 of title 38, United States Code, is amended by adding at the end the following new section:

"§ 4086. Judicial Conference of the Court of Veterans Appeals

"The Chief Judge of the Court of Veterans Appeals may summon the judges of the Court to an annual judicial conference, at a time and place that the Chief Judge designates, for the purpose of considering the business of the Court and recommending means of improving the administration of justice within the Court's jurisdiction. The Court shall provide by its rules for representation and active participation at such conference by persons admitted to practice before the Court and by other persons active in the legal profession.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 4085 the following new item:

"4086. Judicial Conference of the Court of Veterans Appeals.".

SEC. 3. SALARY OF JUDGES.

(a) IN GENERAL.—(1) Subsection (e) of section 4053 of title 38, United States Code, is amended to read as follows:

"(e) Each judge of the Court shall receive a salary at the same rate as is received by judges of the United States Courts of Appeals.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the first day of the first pay period beginning after the date of enactment of this Act.

SEC. 4. JUDICIAL DISCIPLINE.

Section 4053 of title 38, United States Code, is amended by adding at the end the following new subsection:

"(g) The Court shall prescribe rules, consistent with the provisions of section 372(c) of title 28, establishing procedures for the filing of complaints with respect to the conduct of any judge of the Court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, the Court shall have the powers granted to a judicial council under such section.".

SEC. 5. RECUSAL OF JUDGES.

Section 4064 of title 38, United States Code, is amended by adding at the end the following:

"(c) Section 455 of title 28 shall apply to judges and proceedings of the Court.".

SEC. 6. PARTICIPATION OF JUDGES IN THE THRIFT SAVINGS PLAN.

(a) In General.—(1) Subchapter III of chapter 84 of title 5, United States Code, is amended by adding at the end the following new section:

"§ 8440c. Judges of the United States Court of Veterans Appeals

"(a)(1) A judge of the United States Court of Veterans Appeals may elect to contribute to the Thrift Savings Fund.

"(2) An election may be made under paragraph (1) only during a period provided under section 8432(b) of this title for individuals subject to chapter 84 of this title.

"(b)(1) Except as otherwise provided in this subsection, the provisions of this subchapter and subchapter VII of this chapter shall apply with respect to a judge making contributions to the Thrift Savings Fund.

"(2) The amount contributed by a judge may not exceed 5 percent of the amount of the judge's basic pay. Basic pay does not include any retired pay paid pursuant to section 4096 of title 38.

"(3) No contributions may be made for the benefit of a judge under section 8432(c) of this title.

"(4) Section 8433(b) of this title applies with respect to a judge who elects to make contributions to the Thrift Savings Fund and retires under section 4096(b) of title 38.

"(5) A transfer shall be made as provided in section 8433(d) of this title in the case of a judge who elects to make contributions to the Thrift Savings Fund and thereafter ceases to serve as a judge of the United States Court of Veterans Appeals but does not retire under section 4096(b) of title 38.

"(6) The provisions of section 8351(b)(7) of this title shall apply with respect to a judge who has elected to contribute to the Thrift Savings Fund under this section."

(2) The table of sections at the beginning of such chapter is amended by inserting at the end of the items relating to the sections in subchapter III the following:

"8440c. Judges of the United States Court of Veterans Appeals.".

(b) FIRST ELECTION.—A judge of the United States Court of Veterans Appeals on the date of the enactment of this Act may make an election under section 8440c(a) of title 5, United States Code (as added by subsection (a)), within 60 days after the date of the enactment of this Act.

(c) CONFORMING AMENDMENTS.—(1) Section 4096(f)(2)(A) of title 38, United States Code, is amended by inserting "except as authorized by section 8440c of title 5" before the semicolon at the end.

(2) Section 4097(n) of title 38, United States Code, is amended by inserting before the period at the end of the first sentence the following: "except section 8440c of title 5".

SEC. 7. DISTRIBUTION OF THE CONGRESSIONAL RECORD TO THE UNITED STATES COURT OF VETERANS APPEALS.

Section 906 of title 44, United States Code, is amended by inserting "the United States Court of Veterans Appeals," after "the Tax Court of the United States," both places it appears.

SEC. 8. TECHNICAL AMENDMENTS.

Chapter 72 of title 38, United States Code, is amended—

(1) in subsection (c) of section 4067 (as redesignated by section 1), by striking out "Administrator of the National Archives and Records Administration" and inserting in lieu thereof "Archivist of the United States";

(2) in section 4068(b)(2)—

(A) by striking out "shall" and inserting in lieu thereof "may, upon motion of the appellant or the Secretary,"; and

(B) by striking out "before" and inserting in lieu thereof "or"; and

(3) by redesignating the second subsection (d) of section 4054 (authorizing judges of the Court to administer oaths) as subsection (e).

Passed the House of Representatives February 20, 1991.

Attest: DONNALD K. ANDERSON,
Clerk.

II

102d CONGRESS
1st Session

H. R. 1578

IN THE SENATE OF THE UNITED STATES

May 16 (legislative day, April 25), 1991

Received; read twice and referred to the Committee on Veterans' Affairs

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AN ACT

To amend title 38, United States Code, with respect to employment and reemployment rights of veterans and other members of the uniformed services.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Uniformed Services Employment and Reemployment Rights Act of 1991".

SEC. 2. EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.

Chapter 43 of title 38, United States Code, is amended to read as follows:

"CHAPTER 43—EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

"SUBCHAPTER I—PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

"Sec.
"2021. Purposes.
"2022. Relation to other law and plans or agreements.
"2023. Definitions.

"SUBCHAPTER II—PROHIBITIONS, RIGHTS, AND LIMITATIONS

"2031. Discrimination against members of the uniformed services and acts of reprisal prohibited.
"2032. Rights of persons absent from employment to serve in the uniformed services; limits on right.
"2033. Position to which entitled upon reemployment.
"2034. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service.

"SUBCHAPTER III—PROCEDURES FOR ASSISTANCE AND ENFORCEMENT

"2041. Assistance in obtaining employment or reemployment; assistance in asserting claims with respect to State or local government or private employers.
"2042. Assistance in obtaining employment or reemployment by the Federal Government.
"2043. Enforcement of employment or reemployment rights with the Federal Government.
"2044. Enforcement of employment or reemployment rights with a State or private employer.

"SUBCHAPTER IV—INVESTIGATION OF COMPLAINTS

"2051. Conduct of investigation; subpoenas.

"SUBCHAPTER V—MISCELLANEOUS PROVISIONS

"2061. Regulations.
"2062. Reports.
"2063. Severability provision.

"SUBCHAPTER I—PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

"§ 2021. Purposes

"The purposes of this chapter are—

"(1) to encourage noncareer service in the uniformed services of the United States by eliminating or minimizing those disadvantages to civilian careers and employment which would not occur but for such service; and

"(2) to minimize the disruption to the lives of individuals performing service in the uniformed services, as well as minimizing the disruption to employers, to fellow employees, and to the community, by providing for the prompt reemployment of persons completing service in the uniformed services under honorable conditions.

"§2022. Relation to other law and plans or agreements

"(a) Nothing in this chapter shall supersede, nullify, or diminish any Federal or State law (including any local law or ordinance) or any plan provided by an employer which establishes rights or benefits which are greater than or in addition to those provided in this chapter.

"(b) This chapter supersedes State laws (including any local law or ordinance), employer practices, agreements, and plans, and other matters that reduce, limit, or eliminate in any manner rights or benefits provided by this chapter, including the establishment of additional prerequisites to the exercise of such rights.

"§ 2023. Definitions

"For the purposes of this chapter:

"(1) The term 'Attorney General' means the Attorney General of the United States or any person designated by the Attorney to carry out an activity under this chapter.

"(2) The term 'benefit', 'benefit of employment', or 'employment related rights and benefits' means any aspect of the employment relationship, other than wages or salary for work performed, provided by contract or employer practice or custom, that offers advantage, profit, privilege, gain, status, account, or interest and includes, but is not limited to, pension plans and payments, insurance coverage and awards, employee stock ownership plans, bonuses, severance pay, supplemental unemployment benefits, vacations, and selection of work hours or locations of employment.

"(3) The term 'completion of service in the uniformed services under honorable conditions' means the completion of a period of service in the uniformed services in all circumstances except—

"(A) receiving a dishonorable discharge, dismissal, or bad conduct discharge adjudged under chapter 47 of title 10;

"(B) being discharged under other than honorable conditions, under regulations prescribed by the Secretary of Defense or a Secretary concerned; or

"(C) being dismissed from or dropped from the rolls of a uniformed service under section 1161 of title 10.

"(4)(A) Except as provided in subparagraphs (B) and (C), the term 'employer' means any person, institution, organization, or entity paying salary or wages for work performed or having control over employment opportunities, including—

"(i) any person, institution, organization, or entity to whom the employer has delegated employment-related responsibilities; and

"(ii) the Federal Government, any State or political subdivision thereof, and any private employer (including successors in interest).

"(B) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 2034(f).

"(C) In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the Adjutant General of the State in which the technician is employed.

"(5) The term 'Federal Government' includes the executive branch, the judicial branch, and the legislative branch, with the executive branch including—

"(A) any department, administration, agency, commission, board, or independent establishment in, or other part of, the executive branch (including any executive agency as defined in section 105 of title 5);

"(B) the United States Postal Service and the Postal Rate Commission;

"(C) any nonappropriated fund activity of the United States; and

"(D) any corporation wholly owned by the United States.

"(6) The term 'notice' means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.

"(7) The term 'other than a temporary position' means a position of employment as to which there is a reasonable expectation that it will continue indefinitely.

"(8) The term 'qualified' means having the ability to perform the essential tasks of an employment position.

"(9) The term 'reasonable efforts' means actions, including training provided by an employer, that do not create an undue hardship on the employer.

"(10) The term 'Secretary' means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.

"(11) The term 'seniority' means longevity in employment together with any benefits of employment which accrue with or are determined by such longevity.

"(12) The term 'service in the uniformed services' means duty performed in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and the period of time an employee is absent from employment for the purpose of examination to determine fitness for such duty.

"(13) The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

"(14) The term 'uniformed services' means the United States Army, Navy, Air Force, Marine Corps, and Coast Guard, including the reserve components thereof, the Army National Guard and the Air National Guard when engaged in active duty for training or in inactive duty for training, the commissioned corps of the National Oceanic and Atmospheric Administration, the commissioned corps of the Public Health Service, the Merchant Marine during time of war, national emergency, or when deemed necessary by the Secretary of Defense in the interest of national defense, and any other category of persons designated by the President in time of war or national emergency.

"SUBCHAPTER II—PROHIBITIONS, RIGHTS, AND LIMITATIONS

"§2031. Discrimination against members of the uniformed services and acts of reprisal prohibited

"(a) A person who is a member of, was a member of, applies to become a member of, or has an obligation to a uniformed service shall not be discriminated against because of such present or past membership, application for membership, or obligation by being denied initial employment, reemployment, continuation of employment, promotion, or any benefit of employment.

"(b)(1) It shall be unlawful for an employer to discriminate against, discipline, or to take any other action of reprisal against any person because such person has filed a complaint or sought assistance concerning an alleged violation of this chapter, has testified in any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised any right afforded by this chapter.

"(2) The prohibition in paragraph (1) shall apply with respect to employment, reemployment, continued employment, or promotions, and any benefit of employment and shall apply regardless of whether the person with respect to whom the acts are performed has ever served in the uniformed services.

"(c) A person shall be considered to have been denied employment, reemployment, continued employment, any promotion or benefit of employment in violation of this chapter if the person's status or activity protected by this chapter was a motivating factor, although not necessarily the only factor, in the employer's decision to deny the person employment, reemployment, continued employment, any promotion or benefit of employment, unless the employer can demonstrate that the same decision would have been made in the absence of the protected status or activity.

"§ 2032. Rights of persons absent from employment to serve in the uniformed services; limits on right

"(a) Except as otherwise provided in this chapter, any person who is absent from or leaves a position (other than a temporary position) in the employ of any employer for voluntary or involuntary service in the uniformed services is entitled to a leave of absence or is entitled, upon completion of service in the uniformed services under honorable conditions, to—

"(1) reemployment by such employer, unless such employer's circumstances have so changed as to make it impossible or unreasonable to do so; and

"(2) employment related rights and benefits, as provided in this chapter.

"(b) Subsection (a) shall apply if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

"(1) that is required, beyond five years, to complete an initial period of obligated service;

"(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

"(3) performed as required pursuant to section 270 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined by the Secretary concerned to be necessary for professional development or for completion of skill training or retraining;

"(4) performed by a member of a uniformed service who is—

"(A) ordered to or retained on active duty under section 672(a), 672(g), 673, 673b, 673c, or 688 of title 10;

"(B) ordered to or retained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or the Congress;

"(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 673b of title 10;

"(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or

"(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 3500 or 8500 of title 10; or

"(5) any other category of service specified by the Secretary, in consultation with the Secretary of Defense, in regulations prescribed pursuant to section 2061.

"(c) Upon completion of service in the uniformed services under honorable conditions, a person returning from a leave of absence or otherwise entitled to reemployment under this section shall, in order to retain the member's rights under this chapter except as otherwise expressly provided, report to such person's employer for reemployment—

"(1) at the beginning of the first regularly scheduled working period on the first calendar day following completion of such service and the time for safe transportation back to the member's residence and to the member's place of employment—

"(A) if such person's period of service was less than 31 days; or

"(B) if such person's service was for the purpose of examination to determine such person's fitness to enter service in the uniformed services, regardless of the length of such service;

"(2) not later than 14 days following completion of such service and transportation, if such person's period of service was 31 days or more but less than 181 days; or

"(3) not later than 90 days following completion of such service and transportation, if such person's period of service was 181 days or more.

"(d) The time limits specified in subsection (c) for a person to report for employment or reemployment shall be extended—

"(1) by up to one year if the person is hospitalized or is convalescing from an illness or injury incurred in military service;

"(2) by up to two years if the person is a special disabled veteran described in section 2011(1)(A)(i) whose disability significantly impairs the veteran's ability to work and if such person informs, in writing or verbally, the employer concerned of the person's condition, intention to return to employment, and plans for and progress in rehabilitation; or

"(3) by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the time limit specified in paragraphs (1) and (2) impossible or unreasonable.

"(e) A person who fails to report for employment or reemployment within the time limits specified in subsection (c) does not automatically forfeit such person's right under subsection (a) but shall be subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

"(f)(1) When reporting for reemployment upon release from service in the uniformed services, a person, upon request, shall provide to the person's employer such documentation, if any, as is then readily available to establish that the person's application is timely, that the person has not exceeded the service limitations set forth in subsection (b), and that the person completed service in the uniformed services under honorable conditions. Documentation from any official source that these criteria have been met shall satisfy the documentation requirements established by this subsection.

"(2) It shall be unlawful for an employer to delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

"(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

"(h) Any employer who reemploys a person under this chapter and who is an employer contributing to any multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(37)), under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of every such reemployment, provide notice of such reemployment to the administrator of every such plan.

"(i) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of such training or service if the service does not exceed the limitations set forth in subsection (b) and the notice requirements established in section 2034(d) are met.

"§2033. Position to which entitled upon reemployment

"(a) Except as otherwise provided in this chapter, a person who is entitled to reemployment under section 2032 shall—

"(1) if such person's period of service was fewer than 181 days—

"(A) first, be employed promptly in the position which such person would have attained by remaining continuously employed by such employer, unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified with reasonable efforts by such employer; or

"(B) if not employed under subparagraph (A), be employed promptly in the same position which such person left for service in the uniformed services, unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified with reasonable efforts by such employer;

"(2) if such person's period of service was 181 days or more—

"(A) first, be employed promptly in the position which such person would have attained by remaining continuously employed by such employer or in another position which is equivalent in seniority, status, and pay to such position, unless the employer can demonstrate that such person is not qualified for such position or any equivalent position and cannot become qualified with reasonable efforts by such employer; or

"(B) if not employed under subparagraph (A), be employed promptly in the same position which such person left for service in the uniformed services or in another position which is equivalent in seniority, status, and pay to such position, unless the employer can demonstrate that such person is not qualified for such position and cannot become qualified with reasonable efforts by such employer; or

"(3) if disabled because of a disability incurred during, or as a result of, a period of service in the uniformed services, and if, after reasonable efforts by the employer to accommodate the disability, such person is not qualified due to such disability to be employed in the position the person would have attained if the person had remained continuously employed by such employer or in the position which such person left for service in the uniformed services, be employed promptly—

"(A) in any other position which is equivalent in seniority, status, and pay for which the person is qualified or would become qualified with reasonable efforts by the employer; or

"(B) if not employed under subparagraph (A), in a position which is the nearest approximation thereof consistent with circumstances of such person's case; or

"(4) if such person is not qualified to be employed in the position the person would have attained if the person had remained continuously employed by such employer or in the position which such person left for service in the uniformed services for any reason other than disability incurred during a period of service in the uniformed services and cannot become qualified with reasonable efforts by the employer, be employed promptly in any other position of lesser status and pay which such person is qualified to perform, with full seniority.

"(b) If two or more persons are entitled to reemployment under section 2032 in the same position and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to be reemployed in that position. Any person not reemployed in a position because of the application of the preceding sentence is entitled to be employed promptly—

"(1) in any other position which is equivalent in seniority, status, and pay and for which the person is qualified or would become qualified with reasonable efforts by the employer; or

"(2) if not employed under paragraph (1), in a position which is the nearest approximation thereof consistent with circumstances of such person's case.

"§ 2034. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

"(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had at the time such person left the job concerned for service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

"(b) A person who performs service in the uniformed services is considered to be on a leave of absence while in the uniformed services and is also entitled to such other rights and benefits, not determined by seniority, relating to other employees on furlough or leave of absence which were established, by contract, policy, or practice, at the beginning of such period of service or while such person is performing such service. Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to the preceding sentence.

"(c)(1) A person who performs service in the uniformed services shall, at such person's request, continued to be covered by insurance provided by such employer for up to 18 months. Such person may be required to pay the entire cost of any benefit continued pursuant to the preceding sentence, except that in the case of persons ordered to training or service for fewer than 31 days, such person may be required to pay only the employee share, if any, of the cost of such benefit.

"(2) In the case of employer-sponsored health benefits, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a person entitled to participate in these benefits, either under paragraph (1) or upon reinstatement, or a health or physical condition of any other person who is covered by the benefit by reason of the coverage of such person, if—

"(A) the condition arose before or during that person's period of training or service in the uniformed services;

"(B) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by such person in the benefits; and

"(C) the condition of such person has not been determined by the Secretary of Veterans Affairs to be service-connected.

"(d) A person who leaves a civilian job for service in the uniformed services after the 60-day period beginning on the date of the enactment of the Uniformed Services Employment and Reemployment Rights Act of 1991 shall give written or verbal notice to such person's civilian employer that service in the uniformed services will cause such person to be absent from scheduled civilian employment, except that no notice is required in circumstances in which giving notice is impossible or unreasonable, including but not limited to circumstances where providing notice is precluded by military necessity, as determined by the uniformed service concerned, with such determination not being subject to judicial review.

"(e) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—

"(1) if such person's period of service was 181 days or more, within one year;

"(2) if such person's period of service was 31 days or more but less than 181 days, within six months; or

"(3) if such person's period of service was less than 31 days, within a period of time that is equal to the period of service concerned.

"(f)(1) In the case of a benefit provided by an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)), or a benefit provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this subsection.

"(2) Subject to subsection (g)(2), a person reemployed under this chapter—

"(A) shall not be treated as having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services; and

"(B) shall have each period served by such person in the uniformed services deemed to constitute service with the employer or employers maintaining the plan for purposes of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan,

if such person meets the eligibility criteria under this chapter.

"(g)(1) An employer reemploying a person under this chapter shall be liable to an employee benefit pension plan for funding any obligation of the plan to provide the benefits described in subsection (f)(2). For purposes of determining the amount of such liability, and for purposes of section 515 of the Employee Retirement Income Security

Act of 1974 (29 U.S.C. 1145) or for purposes of any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed to be service with the employer pursuant to such subsection shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement.

"(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (f)(2) that are derived from employee contributions only to the extent the person makes payment to the plan with respect to such contributions (not to exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of deemed service described in subsection (f)(2)).

"(h) Any person who is absent from or leaves a position (other than a temporary position) in the employ of any employer for voluntary or involuntary service in the uniformed services may utilize, during any period of such service, accrued or other leave which the person could have utilized if the person had remained in such position.

"SUBCHAPTER III—PROCEDURES FOR ASSISTANCE AND ENFORCEMENT

"§ 2041. Assistance in obtaining employment or reemployment; assistance in asserting claims with respect to State or local government or private employers

"(a) The Secretary (through the Veterans' Employment and Training Service) shall provide assistance in obtaining employment or reemployment to any person entitled to rights or benefits under this chapter. The Secretary may use existing Federal and State agencies engaged in similar or related activities and the assistance of volunteers.

"(b) Any person who claims that a private employer or a State or political subdivision thereof has denied or is about to deny such person any right or benefit under this chapter may apply to the Secretary for assistance in asserting that claim.

"§ 2042. Assistance in obtaining employment or reemployment by the Federal Government

"(a) Except as provided in subsections (c), (d), and (e), if a person is entitled to be reemplcyed under section 2032 by the Federal Government, such person shall be reemployed in a position as described in sections 2033 and 2034.

"(b) Any person who claims that the Federal Government, as employer, has denied or is about to deny such person any right or benefit under this chapter may apply to the Secretary for assistance in asserting that claim.

"(c) If the employer of a person described in subsection (a) was, at the time such person entered service in the uniformed services, an agency in the executive branch, and the Director of the Office of Personnel Management determines that—

"(1) such employer no longer exists and its functions have not been transferred to another part of the executive branch; or

"(2) it is not feasible for such employer to reemploy such person.

The Director shall identify an alternative position of like seniority, status, and pay for which such person is qualified in another part of the executive branch, and the Director shall cause employment in such position to be offered to such person.

"(d) If the employer of a person described in subsection (a) was, at the time such person entered service in the uniformed services, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that—

"(1) it is not feasible for such employer to reemploy such person; and

"(2) such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(c) of title 5,

such person shall, upon application to the Director of the Office of Personnel Management, be considered for and offered employment in an alternative position in the executive branch on the same basis as described in subsection (c).

"(e) If the adjutant general of a State determines that it is not feasible to reemploy a person who was a National Guard technician employed under section 709 of title 32, and such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(d) of title 5, such person shall, upon application to the Director of the Office of Personnel Management, be considered for and offered employment in an alternative position in the executive branch of the Federal Government on the same basis as described in subsection (c).

"§ 2043. Enforcement of employment or reemployment rights with the Federal Government

"(a) Any person who claims that—

"(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by the Federal Government; and

"(2)(A) such employer has failed or refused to comply with the provisions of this chapter; or

"(B) the Office of Personnel Management has failed or refused to comply with the provisions of this chapter,

may file a complaint with the Secretary, and the Secretary shall investigate such complaint. Subsection (a) of section 2051 shall be applicable to such investigation but not subsections (b) and (c) of such section.

"(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint. Before the receipt of a written complaint, the Secretary shall, upon request, provide advice or technical assistance to the potential claimant and, if the Secretary determines it appropriate, to such claimant's employer.

"(c) If the Secretary, after investigation, is reasonably satisfied that such a violation has occurred, if efforts to obtain voluntary compliance are not successful, and if the claimant requests that the claim be referred for litigation before the Merit Systems Protection Board, the Secretary shall refer the case to the Office of the Special Counsel. If the Special Counsel is reasonably satisfied that the person requesting representation is entitled to the rights or benefits sought, the Special Counsel shall appear and act as attorney for the claimant in filing an appeal to the Merit Systems Protection Board and in pursuing that appeal.

"(d) If the Special Counsel refuses to represent a person after receiving a referral from the Secretary or if a person chooses not to apply to the Secretary for assistance or to utilize the Special Counsel for representation under this section, such person may be represented before the Merit Systems Protection Board by counsel of the person's choice.

"(e)(1) If the Merit Systems Protection Board concludes that the Federal Government, as employer, has failed or refused to comply with the provisions of this chapter or that the Director of the Office of Personnel Management has not met an obligation set forth in subsection (c), (d), or (e) of section 2042, the Board shall enter an order specifically requiring the employing agency or the Director to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of the employing agency's or the Director's unlawful action.

"(2) Any such compensation shall be in addition to and shall not be deemed to diminish any of the other rights or benefits provided for by this chapter.

"(f)(1) A claimant under this chapter may petition the United States Court of Appeals for the Federal Circuit to review a decision of the Merit Systems Protection Board denying such claimant the relief sought, in whole or in part, subject to the conditions and in accordance with the procedures set forth in section 7703 of title 5.

"(2) The Secretary and the Special Counsel shall not represent persons with respect to review of decisions of the Merit Systems Protection Board under this chapter in the United States Court of Appeals for the Federal Circuit or the Supreme Court.

"(3) If a person seeks such judicial review, or in any case in which a person is involved in the Board's decision being appealed by another party, such person may be represented by counsel of the person's choice.

"§2044. Enforcement of employment or reemployment rights with a State or private employer

"(a) A person who claims that—

"(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by a State or political subdivision thereof or a private employer; and

"(2) such employer or potential employer has failed or refused to comply with the provisions of this chapter,

may file a complaint with the Secretary, and such complaint shall be investigated under the provisions of subchapter IV.

"(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint. Before the receipt of a written complaint, the Secretary shall, upon request, provide advice or technical assistance to the potential claimant and, if the Secretary determines it appropriate, to such claimant's employer.

"(c) If the Secretary, after investigation, is reasonably satisfied that such a violation has occurred, if efforts to obtain voluntary compliance are not successful, and if the claimant requests that the claim be referred for litigation, the Secretary shall refer the case to the Attorney General. If the Attorney General is reasonably satisfied that the person requesting representation is entitled to the rights or benefits sought, the Attorney General shall appear and act as attorney for the claimant in the filing of a complaint and other appropriate motions and pleadings and the prosecution thereof.

"(d)(1) If any employer which is a private employer or a State or political subdivision thereof fails or refuses to comply with the provisions of this chapter, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the rights or benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the other rights or benefits provided for by this chapter.

"(2)(A) No fees or court costs shall be charged or taxed against any person claiming rights or benefits under this chapter.

"(B) In any action or proceeding to enforce a provision of this chapter by a person described in subsection (a) who obtained private counsel for such action or proceeding, the court, in its discretion, may award any such person who prevails in such action or proceeding a reasonable attorney's fee, expert witness fees, and other litigation expenses.

"(3) The court may use its full equity powers, including temporary or permanent injunctions and temporary restraining orders, to vindicate fully the rights or benefits of persons under this chapter.

"(4) An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter, not by an employer, prospective employer, or other entity with obligations under this chapter.

"(5) If the Attorney General refuses to represent a person after receiving a referral from the Secretary or if a person chooses not to apply to the Secretary for assistance or to utilize the Attorney General for representation under this section, such person may be represented before the district court by counsel of the person's choice.

"(6) In any action under this chapter, only the employer shall be deemed a necessary party respondent.

"(7) No State statute of limitations shall apply to any proceedings under this chapter.

"(8) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

"(e) If reasonably satisfied that the provisions of this chapter have been willfully violated by a private employer or a State or political subdivision thereof, the Attorney General may file a pleading in a district court of the United States in which the private employer concerned maintains a place of business, or in which the State concerned or political subdivision thereof exercises authority, for the assessment of a civil penalty against such employer. If, as a result of the proceeding resulting from such a filing, the employer is found to have willfully failed or refused to comply with any provision of this chapter, a civil penalty of not more than $25,000 for each such failure or refusal may be assessed against such employer, taking into consideration criteria established in regulations by the Secretary for such purpose.

"SUBCHAPTER IV—INVESTIGATION OF COMPLAINTS

"§ 2051. Conduct of investigation; subpoenas

"(a) In carrying out investigations under this chapter, the Secretary's duly authorized representatives shall at all reasonable times have access to, for the purpose of examination, and the right to copy and receive, any documents of any person or employer.

"(b) In carrying out investigations under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply (other than with respect to an investigation carried out under section 2043(a)) to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the Secretary's subpoena.

"(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter (other than an investigation carried out under section 2043(a)). The district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court (other than with respect to an investigation carried out under section 2043(a)).

"SUBCHAPTER V—MISCELLANEOUS PROVISIONS

"§ 2061. Regulations

"(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

"(b)(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to the Federal Government as employer. Such regulations shall be consistent with the regulations pertaining to the States and private employers, except that employees of the Federal Government may be given greater or additional rights. Nothing in this subsection constitutes authority for the Director to prescribe any matter for which any regulation may be prescribed under paragraph (2).

"(2) Regulations may be prescribed—

"(A) by the Merit Systems Protection Board to carry out its responsibilities under this chapter; and

"(B) by the Office of Special Counsel to carry out its responsibilities under this chapter.

"(3) It is the sense of Congress that the Federal Government should be a model employer with respect to the requirements of this chapter.

"§ 2062. Reports

"The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 2043(c) and no later than February 1, 1992, and each February 1 thereafter, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:

"(1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.

"(2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 2044(c) or 2043(c), respectively, during such fiscal year.

"(3) The number of pleadings filed by the Attorney General pursuant to section 2044(e) during such fiscal year.

"(4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).

"(5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.

"(6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

"§ 2063. Severability provision

"If any provision of this chapter, or the application of such provision to any person or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it held invalid, shall not be affected thereby.".

SEC. 3. CONFORMING AMENDMENTS.

(a) AMENDMENTS TO TITLE 38.—(1) Section 3103A(b)(3) of title 38, United States Code, is amended—

(A) by striking out "or" at the end of clause (E);

(B) by striking out the period at the end of clause (F) and inserting in lieu thereof "; or"; and

(C) by adding at the end thereof the following new clause:

"(G) to reemployment benefits under chapter 43 of this title.".

(2) The table of parts preceding part I of such title is amended by striking out the item for chapter 43 and inserting in lieu thereof the following:

"43. Employment and Reemployment Rights of Members of the Uniformed Services .... 2021".

(3) The table of chapters at the beginning of part III of such title is amended by striking out the item for chapter 43 and inserting in lieu thereof the following:

"43. Employment and Reemployment Rights of Members of the Uniformed Services .... 2021".

(b) Amendment to Title 5.—Section 1204(a)(1) of title 5, United States Code, is amended by striking out "section 2023" and inserting in lieu thereof "chapter 43".

(2) Subchapter II of chapter 35 of such title is repealed.

(3) The table of sections for chapter 35 of such title is amended by striking out the items relating to subchapter II.

(c) Amendment to Title 10.—Section 706(c)(1) of title 10, United States Code, is amended by striking out "section 2021" and inserting in lieu thereof "chapter 43".

(d) Amendments to Title 28.—Section 631 of title 28, United States Code, is amended—

(1) by striking out subsection (j);

(2) by redesignating subsections (k) and (l) as subsections (j) and (k), respectively; and

(3) in subsection (j), as redesignated by paragraph (2), by striking out "under the terms of" and all that follows through "section," the first place it appears and inserting in lieu thereof "under chapter 43 of title 38,".

SEC. 4. EFFECTIVE DATES.

(a) REEMPLOYMENT.—(1) Except as provided elsewhere, the amendments made by this Act shall be effective with respect to reemployments initiated on or after the first day after the 60-day period beginning on the date of the enactment of this Act.

(2) The provisions of chapter 43 of title 38, United States Code, in effect on the day before such date of enactment shall continue to apply to reemployments initiated before the end of such 60-day period.

(3) In determining the number of years of service that may not be exceeded in an employee-employer relationship with respect to which a person seeks reemployment under chapter 43 of title 38, United States Code, as in effect before or after the date of the enactment of this Act, there shall be included all years of service without regard to whether the periods of service occurred before or after such date of enactment unless the period of serv-

ice is exempted by the chapter 43 that is applicable, as provided in paragraphs (1) and (2), to the reemployment concerned.

(b) DISCRIMINATION.—The provisions of section 2031 of title 38, United States Code, as provided in the amendments made by this Act, and the provisions of subchapters III and IV of chapter 43 of such title, as provided in the amendments made by this Act, that are necessary for the implementation of such section 2031 shall become effective on the date of the enactment of this Act.

(c) INSURANCE.—(1) Except as provided in paragraph (2), the provisions of section 2034(c) of title 38, United States Code, as provided in the amendments made by this Act, concerning insurance coverage shall become effective on the date of enactment of this Act.

(2) A person who entered active service in the uniformed services after August 1, 1990, and before the date of the enactment of this Act, or a family member or personal representative of such person, may, after the date of the enactment of this Act, elect to reinstate or continue insurance coverage as provided in such section 2034. If such an election is made, insurance coverage may remain in effect for the remaining portion of the 18-month period that began on the date of such person's separation from civilian employment.

(d) DISABILITY.—(1) Section 2033(a)(3) of chapter 43 of title 38, United States Code, as provided in the amendments made by this Act, shall apply to reemployments initiated on or after August 1, 1990.

(2) Effective as of August 1, 1990, section 2027 of title 38, United States Code, as in effect on the date of the enactment of this Act, is hereby repealed.

(e) REPORTS.—The reports made by the Secretary of Labor pursuant to section 2062 of title 38, United States, as provided in the amendments made by this Act, shall be made with respect to cases pertaining to chapter 43 of such title without regard to whether a case originated under such chapter before, on, or after the date of the enactment of this Act.

(f) PREVIOUS ACTIONS.—Except as otherwise provided, the amendments made by this Act do not affect reemployments that were initiated, rights, benefits, and duties that matured, penalties that were incurred, and proceedings that were begun before the end of the 60-day period referred to in subsection (a).

SEC. 5. TECHNICAL AMENDMENT.

Section 9(d) of Public Law 102–16 is amended by striking out "Act" the first place it appears and inserting in lieu thereof "section".

Passed the House of Representatives May 14, 1991.

Attest: DONNALD K. ANDERSON,
Clerk.

Opening Statement
Senator Alan Cranston
Chairman
Committee on Veterans' Affairs

Hearing to Consider Legislation Relating to
Reemployment Rights (S. 1095 and H.R. 1578),
Educational Assistance (S. 868), and
the U.S. Court of Veterans Appeals (S. 1050 and H.R. 153)

May 23, 1991

Good Morning. Welcome to today's hearing, which will focus on legislation in three areas -- veterans' reemployment rights, veterans' education, and the United States Court of Veterans' Appeals. My thanks to all the witnesses who are appearing here today, and to those who have submitted written testimony, for taking the time to share their views with the Committee.

Specifically, this hearing will cover S. 1050, legislation I introduced at the request of the Chief Judge of the Court last week, to allow the Court to accept voluntary services and gifts; H.R. 153, legislation, which passed the House on February 20, to make technical amendments and certain improvements in the Veterans' Judicial Review Act; S. 868, an education bill that I introduced on April 18, to improve education benefits for those who served during the Persian Gulf conflict; S. 1095, the veterans' reemployment rights bill I introduced last week, together with Senators Specter, Deconcini, Graham, Akaka, and Daschle; and H.R. 1578, a veterans' reemployment rights bill that passed the House on May 14.

Clearly, our agenda is quite full this morning. Today's witnesses include representatives of the Department of Veterans Affairs, the U.S. Court of Veterans Appeals, other Executive Branch entities, and veterans' service organizations.

UNITED STATES COURT OF VETERANS APPEALS

We will receive testimony on two measures related to the United States Court of Veterans Appeals. The Court of Veterans Appeals was established by the Veterans Judicial Review Act, compromise legislation crafted in the closing hours of the 100th Congress. Because the Judicial Review Act was drafted under extreme time constraints, the Senate and House Veterans' Affairs Committees have continued to work cooperatively with each other and with Chief Judge Nebeker to make needed technical corrections to the enabling legislation so as to ensure that the Court and its judges are provided with similar authority and held to similar standards as other federal appellate courts.

The two bills before us today -- H.R. 153, which passed the House on February 20, 1991, and S. 1050, which I recently

S. 868, VETERANS' EDUCATION

With reference to the veterans' employment and education measures, the recent Persian Gulf conflict has underscored the impact that commitment of our military forces has on the lives of so many individuals.

S. 868 contains two provisions to improve educational assistance benefits for certain servicemembers and reservists who served during the Persian Gulf conflict. Specifically, this bill would amend chapters 30, 32, and 35 of title 38, United States Code, and chapter 106 of title 10 to restore educational assistance entitlement to participants in the programs under these chapters who had received benefits for the pursuit of courses which they were unable to complete because either they were reservists who were called to active duty or, in the case of active-duty servicemembers, they were assigned duties that prevented them from completing their courses. The bill would also amend chapter 106 to protect reservists who were called to active duty from losing any time in which to use their benefits. It would achieve this by extending the delimiting date for reservists' education entitlement by the length of their periods of active duty and provide that reservists are not to be considered to have been separated from the Selected Reserve for education benefits purposes by reason of their active-duty service.

These provisions are derived from two Persian Gulf benefits bills -- H.R. 1108, as introduced on February 25, and, in part, from S. 490, as introduced by Senator Boren on February 26. Similar provisions were included in the Persian Gulf servicemembers and veterans benefits package -- H.R. 1175, as passed by the House on March 13, and in S. 578, as part of the leadership amendment passed by the Senate on March 14 as an amendment to H.R. 1175 -- but not included in S. 725 as enacted in Public Law 102-25. Unfortunately, the measure enacted on April 6 was limited by a monetary cap on funding for all veterans' benefits in the bill and, as a result, did not include these provisions.

S. 1095, VETERANS' REEMPLOYMENT RIGHTS

S. 1095, the proposed "Uniformed Services Employment and Reemployment Rights Act of 1991," which I introduced on May 16, along with the Committee's Ranking Minority Member, Senator Specter, and Committee members DeConcini, Graham, Akaka, and Daschle, would completely revise chapter 43 of title 38, United States Code, in order to clarify veterans' reemployment rights (VRR) law provisions and to make improvements in various aspects of this law.

With the mobilization of approximately 228,000 reservists introduced at the request of Chief Judge Nebeker -- represent our ongoing efforts in that regard.

H.R. 153

H.R. 153 as passed by the House generally reflects a compromise agreement that the Senate and House Committees on Veterans' Affairs reached on certain bills, amendments, and provisions relating to the Court of Veterans Appeals that were considered by the two Veterans' Affairs Committees, but were not enacted during the 101st Congress. All but two of the provisions contained in this bill were formally requested by Chief Judge Nebeker. As to the two remaining provisions -- one, which would make applicable to the Court of Veterans Appeals the provisions of title 28, United States Code, regarding disqualification, was reported by the Senate Committee in S. 2100. The remaining provision relates to procedures for filing complaints with respect to the conduct of judges.

H.R. 153 would make technical amendments and substantive improvements to the Veterans' Judicial Review Act. Specifically, the bill would (1) delete a provision which requires the Court to include in its decisions a statement of its legal conclusions and determinations as to its factual determinations, (2) authorize the Chief Judge of the Court to convene annually a judicial conference, (3) provide for each judge of the Court to receive a salary at the same rate as judges of the United States Courts of Appeals, (4) make applicable to the Court the provisions of title 28 relating to procedures for filing complaints with respect to the conduct of judges and the disqualification of judges, (5) allow judges of the Court to participate in the Thrift Savings Plan, (6) authorize the distribution of the Congressional Record to the Court, and (7) make certain other technical amendments to the Judicial Review Act.

S. 1050

S. 1050 is legislation that I recently introduced at the request of Chief Judge Nebeker. In his April 18, 1991, letter to me requesting this legislation, Chief Judge Nebeker noted that the Court of Veterans Appeals lacked the authority to establish unpaid internships and to accept gifts of personal property. S. 1050 adopts the language of section 604(a)(17) of title 28, which grants to article III courts authority to accept such services and gifts of personal property. This legislation would allow the Court to establish an intern program for law students and to accept gifts, such as books and works of art.

In view of my strong belief that the Court of Veterans Appeals should be treated like other federal courts, I support enactment of H.R. 153 and S. 1050.

and National Guard members since last August, we have become acutely aware of the price that citizen soldiers, their families, and their employers must pay to meet our national security commitments around the world. Approximately 80 percent of the enlisted personnel and 90 percent of the officers recently activated were full-time employees in civilian jobs at the time of their order to duty.

As of last week, two and a half months after the fighting subsided, 118,000 reservists and Guard members were still on active duty. These individuals -- and their families -- were ready to make and have made many sacrifices. They performed their supporting roles extremely well during the build-up and the weeks of actual conflict. In exchange, I believe the Armed Forces should make it a priority to return these individuals to their civilian jobs and educational pursuits as quickly as operational needs can allow. They should not be kept on for the convenience of the military and doing jobs that could be turned over to active-duty personnel or contractors.

Generally speaking, employers have reacted in a truly patriotic and supportive manner. I am concerned, however, that employer support -- the main element in the successful workings of veterans' reemployment rights laws for over 50 years -- may be severely tested with the continued active deployment of nearly half of the mobilized reserve force, a significant number of whom still are being used to perform duties in an uncertain overseas environment while regular forces are being welcomed home. Our all-volunteer military depends on the ready reserves for roughly 45 percent of its total force. If employers perceive the continuing retention of reserves as unreasonable, support could deteriorate and put the entire total-force concept at risk. Prior to Desert Shield, employment conflicts were said to account for as much as one third of the unprogrammed losses in the Selected Reserves. I am concerned that that figure could grow if the citizen soldiers are not back at their jobs when the parades are over.

As Chairman of this Committee, I am deeply concerned that 1,617 VA health-care workers -- including 212 physicians and 891 nurses -- are still not back.

As dramatic and far reaching as are the massive reserve call-ups, the ongoing test of the reemployment rights law, year-in and year-out, relates to the ordinary requirements of being a member of the Selected Reserve or National Guard. In S. 1095, we are proposing a complete revision of the 50-year-old reemployment rights laws in order to clarify the complex and archaic provisions of current law and to codify certain important court decisions. Our aim is to avoid delays and disputes in the implementation of the law by stating more clearly the rights and obligations of all parties.

At this time, I recognize the cooperative efforts of many here today who have had a part in bringing forward this needed VRR revision. About three years ago, the Departments of Labor, Defense, Veterans Affairs, and Justice, together with the Office of Personnel Management, began the tedious process of reorganizing this seemingly simple, but highly technical, chapter of title 38. Their efforts served as the basis on which the Chairman of the House Veterans' Affairs Subcommittee on Education, Training, and Employment, Representative Penny, was able to develop H.R. 1578, a bill that passed the House on May 14. H.R. 1578, in turn, served as a starting point for S. 1095, which was developed with various changes and with further technical assistance from the Administration.

For 50 years the reemployment rights program has run very smoothly, due in large part to the efforts of the Department of Labor, where more than 90 percent of disputed cases are resolved by negotiation rather than litigation, and of the Department of Defense, whose National Committee for the Support of the Guard and Reserve keeps the lines of communication open between employees, their units, and their employers.

Finally, I note with appreciation the aggressive leadership taken by the Director of OPM during the recent Persian Gulf conflict to provide an affirmative support of federal employees ordered to active duty -- perhaps as much as 15 percent of the activated reserve and National Guard forces.

Many of the provisions in this bill are intended only to restructure and clarify current law. At this time, I will only discuss in detail provisions of the new chapter 43 that would make significant substantive changes to the VRR law.

Prohibition Against Discrimination and Acts of Reprisal Against Reservists

The proposed new section 4321 of title 38 would expand the current prohibition against discrimination, which provides that a person may not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of an obligation as a member of the reserves or National Guard. The new section would provide that a person who serves in the uniformed services, or who has plans to serve, past service, or an obligation for future service, may not be denied initial employment, reemployment, continuation of employment, promotion, or any other benefits of employment by an employer on the basis of service or the individual's plan or obligation to serve. As a further expansion, the bill would prohibit employer reprisals against employees who have taken an action to enforce their employment or reemployment rights or against witnesses in such cases.

To maintain a strong and effective reserve force, it is necessary to ensure reservists that they will not have to sacrifice their civilian job security and advancement because of an obligation for service in uniform. This provision would strengthen considerably the current-law proscription against discrimination.

Maximum Period of Service for Coverage

Under current law, a person is permitted to remain on active duty for a total of four years and still retain reemployment rights. An additional year of eligibility for reemployment rights is granted if a person remains on active duty beyond the four-year period at the request of, and for the convenience of, the federal government. The service limitations in current law apply only to active-duty service.

Proposed new section 4322 of title 38 would simplify this four-plus-one limitation by replacing it with a five-year limit on the cumulative length of absence from a position of employment for reemployment rights purposes. The five-year service limitations would apply to all types of service in the uniformed services.

However, in certain instances, training needs, emergency situations, or other extraordinary national defense needs may require noncareer servicemembers to serve longer than five years. As the VRR law is intended to protect civilian employment in order to encourage noncareer military service, the new section would provide for certain exceptions to the five-year service limit. These exceptions would include service required to complete an initial period of obligated service, involuntary retention on active duty during a war or national emergency, National Guard and reserve training requirements under specific statutes, additional training determined by the Secretary of Defense to be necessary for individual professional development or skill training, and any category of service specified in regulations prescribed by the Secretary of Labor in consultation with the Secretary of Defense.

Scope of Coverage

Under current law, an individual is eligible for reemployment rights only if the position held prior to absence for service in the uniformed services was "other than temporary." There is no definition of "temporary" for reemployment purposes, and the scope of the exclusion is unclear. Over the past 50 years, the courts have determined that many positions that employers would describe as temporary are covered by the current law.

As first proposed by the Chairman of the Committee on Labor and Human Resources, Senator Kennedy, in S. 336, our bill would repeal the exclusion of temporary positions. In proposing the application of the reemployment rights law to temporary positions, we intend to remove one potentially contentious issue -- whether a particular job was temporary or not -- that could create an unnecessary obstacle to prompt reemployment.

The inclusion of temporary positions would not alter for employers the fundamental protection in current law -- and incorporated in our bill -- against having to reemploy an individual when the employer's circumstances have changed so as to make it impossible or unreasonable to do so. I also note that the employer is only obligated to restore the individual to a position that he or she would have attained by continuous employment without interruption for service in the uniformed services.

Applications for Reemployment

Under current law, distinctions are made among types or categories of military training or service for the purposes of reemployment rights. For example, the time periods during which a person must report back to work vary depending on the type of service, and an employee who is ordered to active duty as a reservist is treated differently than an employee who is inducted into the Armed Forces.

Under proposed new section 4322 all types of service would be treated as "service in the uniformed services" and time periods during which a person must return to work or make an application for reemployment would be based on the length of an individual's absence for that service.

In addition, proposed new section 4322 would provide for an extension of up to two years of reemployment reporting dates for persons who are hospitalized for or convalescing from a service-connected injury or illness. Current law provides for an extension of reporting requirements by up to one year while the individual is hospitalized. In my view, this does not allow sufficient time for recovery or rehabilitation. Appropriate physical and vocational rehabilitation can take a considerable amount of time during and beyond hospitalization. This bill would afford persons with service-connected disabilities a more reasonable amount of time for recovery and rehabilitation.

Reasonable Accommodation of Disabled Persons

The Persian Gulf War Veterans' Benefits Act of 1991 amended the VRR law to require employers to make reasonable accommodations for disabled persons seeking reemployment. That provision was derived from a provision of S. 336 as introduced by

Senator Kennedy. However, in conference with the House an exemption from this requirement was added for certain employers, primarily small businesses. When the Senate considered the conference report on S. 725, I noted my concern that disabled veterans seeking to return to jobs with small employers would not have the clear right to reasonable accommodation even where it would not result in undue hardship for the employer. As promised, I did revisit this issue in the development of this revision of the reemployment rights law. Thus, proposed section 4323 contains no limitation on the applicability of the reasonable accommodation requirement.

Employment Rights and Benefits

Continuation of Insurance Coverage: Proposed new section 4325 would provide for, at the employee's request, a continuation of employer-offered insurance coverage for up to 18 months after an individual enters on duty in a uniformed service. The employee generally could be required to pay no more than 102 percent of the premium required of other employees for such a continuation of coverage, and a person serving for less than 31 days may not be required to pay more than the normal employee share of any premium.

When Congress passed a similar health benefit provision in the Consolidated Omnibus Budget Reconciliation Act of 1985, it exempted group health plans sponsored by the federal government and certain church-related organizations, as well as private sector, State, and local plans maintained by employers with fewer than 20 employees in the previous year. The proposed new section would close those gaps for purposes of the reemployment rights law and provide the health-care option for all those whose employment is interrupted by service in the uniformed services.

Retention Rights: Under current law, retention rights for reemployed persons are based upon length of service in the uniformed services. Thus, the law generally requires that persons who are reemployed in their civilian jobs after serving for 90 days or more cannot be discharged without cause for one year. A person who served less than 90 days cannot be discharged without cause for six months.

I believe that a person's retention rights should be linked to the amount of previous employment with a particular employer, not the length of absence for service in the uniformed services. For example, an employee with 18 years of seniority who must report for a month of reserve training should not have only six weeks of protection upon returning to the job. Thus, proposed new section 4325 would provide a person who had been employed with an employer for less than four years, including time spent in the uniformed services, with six months of retention rights. A person who had been employed with an employer for four or more years, again including time spent in the uniformed services, could not be discharged without cause for one year.

Accrued Leave: Proposed new section 4325 also would provide that a person, upon submitting a written request to his or her employer, would be able to use accrued leave while serving in the uniformed services. Under current law, many employers treat persons ordered to active duty as if they were on furlough or leave without pay. Thus, the salary that they earn from the uniformed services, which often is less than their civilian pay, becomes their only income. This provision would allow employees with accrued annual leave with pay to use that leave while serving in the uniformed services, thereby helping to alleviate the hardship of a suddenly reduced income.

Employee Pension Benefit Plans: Proposed new section 4326 would clarify conflicting federal case law regarding employee rights to various pension benefits plans while on active duty with the uniformed services. All pension benefit plans described in the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) or under federal or State laws governing pension benefits for governmental employees -- whether defined-benefit or defined-contribution plans -- would be covered by the new law. Under this provision, for pension purposes, a person would be treated as not having incurred a break in service with the employer; service in the uniformed services would be considered service with the employer; the employer who reemploys the person would be liable for funding any resulting obligation; and the reemployed person would be entitled to any accrued benefits from employee contributions to the extent that the person makes payments.

Entitlement Limitations: A number of lawsuits have arisen regarding extended and frequent reserve and National Guard training tours of duty. Although current section 2024(d) of title 38 does not place a limit on the nature, timing, frequency, or duration of periods of military training, a number of judicial decisions have upheld the application of a "reasonableness" requirement to military leave requests. It is my belief that such a test is contrary to the purposes of the VRR law and unduly constrains the ability of the uniformed services to determine the best use of its reserve members. Proposed new section 4327 would clarify conflicting federal case law regarding limitations on entitlement to reemployment rights and benefits by providing that entitlement does not depend upon the timing, frequency, duration, or nature of a person's service. This provision would preclude training requests being subject to a "reasonableness" test by employers to determine a reservist's entitlement to reemployment rights and benefits.

Assistance in Obtaining Reemployment or Other Rights or Benefits

Under current law, the Secretary of Labor is required to assist persons who seek the Secretary's help in obtaining reemployment. In carrying out this requirement, the Secretary utilizes State and federal agencies and volunteers. Proposed new section 4332 would provide clear instructions regarding the submission of a complaint to the Secretary of Labor and the Secretary's responsibilities in providing assistance.

Investigations of Complaints

Most reemployment cases currently are resolved without the need for litigation. Upon receiving a complaint from a returning employee, the Department of Labor notifies the employer and investigates the circumstances under which restoration was denied to determine if the employee is entitled to the job. The Department then attempts to achieve voluntary compliance with the law by the employer to obviate the need for litigation.

In order to strengthen the ability of the Department to investigate and resolve these cases in a timely manner, proposed new section 4332 would authorize the Secretary of Labor to request by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Enforcement

Federal Government Employees: In the case of failure or refusal by the federal government to comply with the reemployment rights law, current law provides the Office of Personnel Management with the authority to order compliance and to require compensation for loss of salary or wages for the employee concerned. These cases are adjudicated by the Merit Systems Protections Board, before which claimants must represent themselves or retain private counsel at their own expense. Unlike employees of State or private employers, however, federal employees receive no federal representation in adjudicating their reemployment rights.

This bill would rectify the inequity that exists for federal workers who seek enforcement of the VRR law. Under proposed new section 4333, federal employees whose cases are not resolved successfully by the Department of Labor would be able to request representation by the Office of Special Counsel before the MSPB. Alternatively, they could appear before the MSPB with representation of their own choosing.

In addition, federal employees would be able to petition a U.S. Court of Appeals to review a decision of the MSPB and could continue to be represented by Special Counsel at the appellate level. Both the MSPB and Courts of Appeals would have the authority to award reasonable attorneys' fees, expert witness fees, and other litigation expenses to individuals who prevail.

Employees of State and Private Employers: Under current law, the employees of State and private employers are provided with representation for their VRR claims by United States Attorneys. Thus, responsibility for determining which cases merit representation is dispersed throughout 94 federal district jurisdictions, which has led to some differential treatment of VRR claims based on where the individual seeking reemployment lives. Proposed new section 4334 would give the Attorney General the authority to decide which cases will receive representation. This should help to ensure that the provision of federal representation is dependent more upon the merits of individual cases and less upon the location of the employee concerned.

As in the case of federal employees, this section would give individuals the option of choosing private counsel and would authorize the award of attorneys' fees and expenses to employees who prevail.

Outreach Program

The best way to ensure timely reemployment is to provide employers and employees with accurate information regarding their rights, benefits, and obligations under the law. Thus, this bill would require the Secretary of Labor, after consultation with the Secretaries of Defense, Transportation, Health and Human Services, and Veterans Affairs, to make reemployment rights information available to veterans, persons serving in the uniformed services, and employers of such persons.

ANNOUNCEMENT REGARDING DIC REFORM

I have an announcement about DIC reform. I have been working for several months to draft a bill to reform the dependency and indemnity compensation program. My proposal will address the present inequities in the system, without reducing benefits for those already receiving DIC.

I have not yet introduced a DIC-reform bill because I feel that it would not be responsible to do that before we have a firm idea of the cost of the proposal. On April 2, Committee staff asked the Congressional Budget Office to provide me with a preliminary cost estimate for my draft bill. Unfortunately, data currently available from VA are not sufficient to allow CBO to make a reliable estimate, and VA advises that it could take several months to collect sample data sufficient for this purpose. I will place in the record of this hearing a copy of a letter I received from CBO about this problem.

BEST COPY AVAILABLE

For these reasons, I have decided to remove DIC-reform from the agenda of the June 12 hearing and the June 26 markup. This will enable other legislation -- most notably the COLA for service-connected compensation -- to go forward in a timely manner.

I plan to hold hearings on DIC-reform proposals as soon as we receive the Administration's bill and a cost estimate for my bill.

CONCLUSION

In closing, I note that a mark-up for the education and Court of Veterans Appeals legislation before the Committee today has been scheduled for June 6, 1991. Due to the complexity of the reemployment rights legislation, it will be included in the Committee's June 26 mark-up. I look forward to working with VA and the other organizations represented here today, the Committees Ranking Minority Member, Senator Specter, and all Members of the Committee to develop legislation that will gain the support of our Committee.

Again, my sincere thanks for your participation today.

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

Robert D. Reischauer
Director

May 22, 1991

Honorable Alan Cranston
Chairman
Committee on Veterans Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Your staff has asked the Congressional Budget Office to provide you with an update on the status of our efforts to estimate the cost of legislation to reform the Dependency and Indemnity Compensation (DIC) program. The request pertained to the Committee's draft proposal that we received on April 2, 1991.

As we discussed with your staff, there were no data available on which to base a reliable estimate of the impact of this legislation. Therefore, on April 10, 1991, CBO asked that the Department of Veterans Affairs (VA) provide us with data on a sample of 1,200 DIC cases. On May 9, 1991, CBO received from VA limited information on a much smaller sample of cases. After reviewing the data, we determined that it is insufficient for our purposes, and on May 13 we resubmitted the original request. At this time, VA expects to have the full sample available within a few months.

Nevertheless, CBO is now examining alternative ways of estimating the DIC proposal based on data currently available. We would like very much to provide the Committee with an indication of the magnitude of this proposal's effects on the DIC population and on the budget, but our ability to analyze the proposal effectively will be constrained by the inadequacy of the available data. As discussed with your staff, we hope to provide a preliminary estimate to the Committee shortly after the Memorial Day recess. Once we receive the full sample data from VA, we will review our preliminary estimate in the light of new information.

We will continue to keep your staff informed of the status of this estimate.

Sincerely,

Robert D. Reischauer

STATEMENT OF SENATOR ARLEN SPECTER (R-PA)
IN CONNECTION WITH THE MAY 23, 1991 HEARING OF
THE SENATE COMMITTEE ON VETERANS' AFFAIRS

Good morning, Mr. Chairman, and thank you. And thanks also to our witnesses. I can see we will have a full morning on these important matters.

Mr. Chairman, I am pleased to be present this morning for the Committee's hearing on five important bills: S. 1095, the "Uniformed Services Employment and Reemployment Rights Act of 1991," and its companion measure from the House, H.R. 1578; S. 868, a bill to make amendments in education measures for the benefit of our Persian Gulf War veterans; H.R. 153, a bill to make miscellaneous administrative and technical improvements in the operation of the United States Court of Veterans Appeals; and S. 1050, a bill which would permit the Court of Veterans Appeals to accept voluntary services.

S. 1095/H.R. 1578

Mr. Chairman, I was pleased to join you as an original cosponsor of S. 1095, the "Uniformed Services Employment and Reemployment Rights Act of 1991." This bill would amend the veterans' reemployment rights (VRR) law (chapter 43 of title 38, United States Code) to provide a basic reorganization of the VRR law, and to assure that returning servicemembers are protected in all aspects of their employment (except for pay and work performed) as if they had been continuously employed during such period of service.

Since 1940, veterans, reservists and members of the National Guard have enjoyed varying degrees of protection that assured their return to civilian pre-service employment following military duty. During those 50 years, VRR law has grown in size and complexity. Nevertheless, since its last substantial recodification in 1974, more than 600 court cases have further defined the limits of the law. Not surprisingly, occasional confusion has resulted, leading to the need for this bill.

I am pleased to note that S. 1095 draws in large part on three years of hard work by a task force comprised of representatives of the Departments of Labor, Defense and Justice, and of the Office of Personnel Management. The majority and minority staffs of the Committee on Veterans' Affairs, in a bipartisan effort, have worked together and with Administration officials to produce the bill we introduced last Thursday, May 16. We will also be reviewing a very similar bill, H.R. 1578, which passed the House on May 14. While there remain a few technical matters to work out, I am confident that all concerns can be resolved.

This area of the law, Mr. Chairman, can be highly technical. But to the individual citizen-soldiers--the men and women on whom this nation has proudly relied in times of military crisis--these rights are critical. Further, our total force policy makes our country more dependent than ever on the Reserve Components for essential military readiness. There can be no clearer demonstration of this than the current situation in the Persian Gulf, when many of our friends and neighbors unhesitatingly traded business attire for desert fatigue uniforms to protect our interests thousands of miles from home.

The purpose of S. 1095 is to clarify the rights of these brave men and women. I am proud to be associated with such an effort, and look forward to reviewing the testimony on this bill at our hearing today.

S. 868

Mr. Chairman, S. 868, would restore certain educational benefits available to reserve and active-duty personnel under the Montgomery GI Bill to students whose course studies were interrupted by being called to active duty or given increased work as a result of the Persian Gulf conflict. The pursuit of education is an important one, and those individuals who not only pursue academic excellence, but also answer the call to duty of their country should not be penalized with the loss of their educational benefits. This legislation would restore the full amount of benefits available to the student veteran as if the interrupted course had not been taken.

H.R. 153

Mr. Chairman, H.R. 153 would amend title 38, United States Code, to make miscellaneous administrative and technical improvements in the operation of the United States Court of Veterans Appeals.

Technically, the bill would eliminate the current 30-day delay in the effective date of COVA decisions and make discretionary, rather than mandatory, the return by the Court of books, records, and diagrams submitted to the Court as part of an administrative determination.

Administratively, the bill would direct the Court to prescribe rules which establish procedures for the filing, investigation, and ruling of complaints with respect to the conduct of any COVA judge; authorize the Chief Judge of the Court to annually summon the judges of such Court to a judicial conference in order to consider business of the Court and to improve the administration of justice within the Court's jurisdiction; apply current Federal rules concerning the disqualification of justices, judges, or magistrates to COVA;

and require the Congressional Record to be distributed to the COVA.

With respect to the individual COVA judges, the bill would raise the salary of the associate judges from one equal to that of a U.S. District Court judge--currently $125,100--to one equal to the salary of a U.S. Court of Appeals judge--currently $132,700--and would permit COVA judges to contribute five percent of their basic pay to the Thrift Savings Fund.

S. 1050

S. 1050 would permit COVA to accept voluntary services and gifts of personal property--such as law books and works of art--and to establish unpaid law student intern and extern programs similar to those operated by other federal courts. This bill, Mr. Chairman, was requested by the Court and parallels authority within the Article III courts.

Mr. Chairman, I look forward to hearing and reviewing today's testimony.

SENATOR JAMES M. JEFFORDS
SENATE VETERANS AFFAIRS COMMITTEE
MAY 23, 1991

Mr. Chairman:

I would like to welcome members of the veterans services organizations and officials from the Departments of Veterans Affairs, Defense, Labor, and Justice here today to present testimony concerning changes and improvements in veterans' education and employment benefits and judicial review issues. I am pleased to be able to have a chance to hear your valuable input on the legislation before us this morning.

Clearly, we all agree on the importance and of S. 868, a bill introduced by the Chairman of this committee, Senator Cranston. S. 868 would restore educational benefits lost by members of the Armed Forces as a result of being called up to active duty, or being deployed and unable to complete the courses in which they were enrolled.

Also introduced by Senator Cranston is S. 1095, the Uniformed Services Employment and Reemployment Rights Act of 1991. As you all know, since shortly before World War II, employment protections for members of the Armed Forces have been in place to ensure veterans that their civilian jobs would not be jeopardized by their military service. However, over the years, many changes have been made to the original law to meet the changing circumstances of military duty. Consequently, the law has become complex and difficult to interpret.

Recognizing the inadequacy of the existing veterans reemployment statutes, a task force was formed in 1987 to determine what revisions had to be made to meet the needs of today's veterans. For three years task force members representing the Departments of Labor, Defense, Justice, and the Office of Personnel Management have worked to draft effective revisions. S. 1095 is the result of their efforts.

It is very important to remember that because we are reducing the size of our Armed Forces, we must rely more and more on the Reserves and the National Guard. While offering incentives to retain and recruit personnel into the Reserves and National Guard, we must also offer a guarantee that military service will not result in the loss of their jobs.

And finally, I am looking forward to hearing testimony concerning S. 1050, legislation requested by Chief Judge Nebeker of the Court of Veterans Appeals, and H.R. 153, the Veterans Judicial Review Amendments of 1991.

Thank you, Mr. Chairman.

STATEMENT BY SENATOR ALAN K. SIMPSON
SENATE COMMITTEE ON VETERANS AFFAIRS, HEARING OF MAY 23, 1991

MR. CHAIRMAN, I APPRECIATE HAVING THIS OPPORTUNITY TO COMMENT ON THESE IMPORTANT ISSUES RELATING TO THE EMPLOYMENT AND EDUCATION OF VETERANS AND THE COURT OF VETERANS APPEALS. THIS HEARING IS AN APPROPRIATE FORUM FOR THESE MATTERS WITH WHICH WE ARE ALL SO DEEPLY CONCERNED.

I WANT TO COMMEND THE ADMINISTRATION, AS WELL AS THE CHAIRMAN AND RANKING MEMBER, FOR WORKING SO DILIGENTLY TO INTRODUCE LEGISLATION WHICH AMENDS THE VETERANS REEMPLOYMENT RIGHTS (VRR) LAWS. THE NEED TO CLARIFY AND REVISE THESE LAWS IS UNMISTAKABLE. I BELIEVE THAT THIS PROPOSAL IS A THOUGHTFUL AND TIMELY RESPONSE TO THE NEEDS OF VETERANS AND ONE THAT MOST DEFINITELY DESERVES THE ATTENTION OF THIS COMMITTEE.

I KNOW THAT THE DEPARTMENTS OF LABOR, DEFENSE, AND JUSTICE, AND THE OFFICE OF PERSONNEL MANAGEMENT HAVE ALL PLAYED KEY ROLES IN DRAFTING BOTH THIS BILL AND A SIMILAR BILL WHICH WAS RECENTLY PASSED BY THE HOUSE OF REPRESENTATIVES. I TRUST THAT WE WILL ALL WORK TOGETHER IN RESOLVING WHATEVER TECHNICAL DISAGREEMENTS MAY STILL REMAIN. IT IS OUR RESPONSIBILITY TO ASSURE THAT THOSE CITIZENS WHO MAY BE PRESSED INTO ACTIVE DUTY ARE TREATED FAIRLY WHEN THEY RETURN TO THEIR JOBS. I PLEDGE MY FULL SUPPORT FOR MEETING THIS IMPORTANT OBJECTIVE.

I ALSO WANT TO EXPRESS MY SUPPORT FOR THE "EDUCATIONAL ASSISTANCE AMENDMENTS" THAT THE CHAIRMAN HAS INTRODUCED. AGAIN, THESE PROVISIONS ARE AN APPROPRIATE RESPONSE TO THE EDUCATIONAL NEEDS OF THOSE SERVICE

MEMBERS AND RESERVISTS WHO SERVED IN THE GULF CONFLICT. THEY PROPOSE THAT EDUCATIONAL ASSISTANCE BENEFITS BE RESTORED TO THOSE INDIVIDUALS WHO HAD RECEIVED BENEFITS, BUT WERE UNABLE TO COMPLETE THEIR COURSES BECAUSE OF THEIR SERVICE. ALL THOUGHTFUL PERSONS WILL AGREE THAT THE FINE YOUNG MEN AND WOMEN WHO HAVE SERVED THIS COUNTRY WITH SUCH DISTINCTION SHOULD NOT LOSE ANY EDUCATIONAL ASSISTANCE BENEFITS BECAUSE THEIR SERVICE PREVENTED THEM FROM COMPLETING THEIR COURSES. WE JUST WILL NOT LET THAT HAPPEN.

FINALLY, I WOULD LIKE TO COMMENT ON THE COURT OF VETERANS APPEALS LEGISLATION. WHILE THESE BILLS SEEM TO BE NONCONTROVERSIAL FOR THE MOST PART, I WOULD OFFER A CAUTIONARY NOTE ABOUT THE PROVISION IN THE HOUSE BILL THAT REQUIRES EACH JUDGE OF THE COURT TO BE PAID AT THE SAME RATE AS JUDGES ON THE U.S. COURTS OF APPEAL. I UNDERSTAND THAT THE RATIONALE FOR PAYING THE CHIEF JUDGE AT THE HIGHER RATE IS TO COMPENSATE HIM FOR HIS ADMINISTRATIVE DUTIES. BUT I DO HAVE SOME RESERVATIONS ABOUT THE MERITS OF PAYING THE OTHER JUDGES AT THE HIGHER RATE.

THE COURT OF VETERANS APPEALS IS AN ARTICLE I COURT, JUST LIKE THE U.S. CLAIMS COURT OR THE U.S. TAX COURT, BOTH OF WHICH ARE PAID AT THE SAME RATE AS U.S. DISTRICT COURT JUDGES. I THINK THIS IS A PROVISION WE MAY WANT TO REVIEW MORE CLOSELY TO DETERMINE IF, IN FACT, THE RESPONSIBILITIES OF THE COURT WARRANT THIS PAY INCREASE. I UNDERSTAND THAT THE MONETARY EFFECT OF THIS LEGISLATION WOULD BE ABOUT $7500 PER JUDGE. COMPARED TO SOME OF THE OTHER THINGS WE DO AROUND HERE, THAT MIGHT SEEM TO BE A PALTRY SUM OF MONEY, BUT I DO NOT BELIEVE THAT ALONE IS SUFFICIENT REASON TO APPROVE THIS PROVISION. I WOULD URGE MY

COLLEAGUES TO GIVE THIS PAY INCREASE A MORE THOROUGH REVIEW BEFORE PASSING IT INTO LAW.

AGAIN, I THANK THE CHAIRMAN AND RANKING MEMBER FOR THEIR LEADERSHIP ON THESE ISSUES. SOME OF THE LEGISLATION WE CRANK OUT OF THIS COMMITTEE TENDS TO BE A BIT DRY AND LACKING IN GLAMOR, BUT IT IS SO VERY IMPORTANT TO THE VETERANS WHO BENEFIT FROM IT. I AM PROUD TO BE INVOLVED IN THESE MATTERS AND I LOOK FORWARD TO CONTINUING A PRODUCTIVE SESSION.

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE A HEARING OF THE SENATE VETERANS AFFAIRS COMMITTEE REFERENCE VETERANS EDUCATION AND EMPLOYMENT AND THE COURT OF VETERANS APPEALS, THURSDAY, MAY 23, 1991, RUSSELL 418, 9:40 AM.

MR. CHAIRMAN:

It is a pleasure to be here today to receive testimony on several pieces of veterans legislation, including: 1) S. 868, a bill to improve educational assistance benefits for members of the armed forces who served on active duty during the Persian Gulf War; 2) S.1095, the Uniformed Services Employment and Reemployment Rights Act; 3) the Court of Veterans Appeals pay raise legislation; and 4) S. 1050, legislation to allow the Court of Veterans Appeals to accept voluntary services, gifts, and bequests.

Mr. Chairman, I would like to commend you and the ranking minority member, Senator Specter, for scheduling this hearing. I also want to take this opportunity to extend a warm welcome to the distinguished group of witnesses present today. It is good to see that Chief Judge Frank Nebeker is with us today. It has been a little over two years since the Court of Veterans Appeals was established and Judge Nebeker has shown the able leadership neccesary to the success of the Court's mission of protecting the rights of our veterans. The welfare of veterans has always been a matter of utmost concern to me, and I am pleased to hear from each of the witnesses this morning.

Due to the tremendous Federal deficit and the struggle to get the budget under control, all Senate committees face the difficult task of weighing competing demands for limited Federal resources. At the same time, we must remain committed to providing the best of care for the brave men and women who have served in the armed forces.

The testmony presented here today will help this committee to make well-informed decisions and I want to thank the witnesses for the insight they will share with us.

Mr. Chairman, I must leave to attend another meeting at this time. I look forward to reviewing the testimony.

END

STATEMENT OF
THOMAS E. COLLINS
ASSISTANT SECRETARY OF LABOR
FOR VETERANS' EMPLOYMENT AND TRAINING
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

May 23, 1991

Mr. Chairman and Distinguished Members:

Thank you for the opportunity to present testimony on the Uniformed Services Employment and Reemployment Rights Act. I certainly support the Committee's effort and recognize your commitment toward strengthening the veterans' reemployment rights program through a new Uniformed Services Employment and Reemployment Rights Act.

The citizen soldier is an American tradition. Throughout our history, Americans have left their civilian pursuits to defend the nation and the principles of liberty and justice we cherish. The recent conflict in the Middle East has been no exception. Thousands of men and women serving in the National Guard and other military reserve components were called to active duty to respond to an act of aggression that challenged and threatened all who value freedom and rule of law. In addition, experienced merchant seamen left other lines of work to staff cargo and Navy vessels going to the theater of operations. Some have come back, others soon will return. They have and will be coming home -- returning to their families and to the civilian endeavors they interrupted to serve our nation.

Since 1940, the existing Veterans' Reemployment Rights law has protected employees who leave civilian jobs for voluntary or involuntary service in the regular military forces. Upon completion of their military service, they are entitled to return to their previous civilian jobs or similar jobs with the precise seniority, status and rate of pay they would have attained if they had remained continuously employed. Throughout the years, amendments to the law have given Reserve and National Guard members the right to leaves of absence from their civilian jobs to participate in military training, and have protected them from service-related discharge or discrimination in employment by their employers.

Under the Total Force Policy, adopted by the Department of Defense in 1973 and recently validated by Operation Desert Storm, our country is more dependent than ever before upon the Reserve Components. An essential element of readiness is participation in training necessary to maintain and enhance military skills. Reserve Component personnel are unlikely to be willing to participate in such training unless they can be offered reasonable assurances that they will not suffer harm with respect to their civilian jobs and careers. For this reason, the effective enforcement of reemployment rights is more important than ever before.

After a three-year effort by a Task Force of interested Federal agencies, the Administration proposed a comprehensive revision of the Veterans' Reemployment Rights statute to secure the reemployment rights of servicemembers. The need for this revision was magnified during this latest military action when large numbers of Reserve and National Guard members were activated and some weaknesses in the Veterans' Reemployment Rights law became more apparent.

The Administration's proposal, which has been substantially adopted by the House of Representatives as H.R. 1578, is designed to establish clearly the rights of servicemembers and the responsibilities of employers through clear, simple statutory language. The Administration's intent also was to ensure that rights under the existing statute and its case law would be improved or preserved. In addition, we sought to reduce case loads and litigation through more timely resolution of differences.

We are very pleased that the Committee's leadership has proposed legislation that would accomplish many of these improvements, while also retaining and continuing the basic focus and rights of the current law. For example, S. 1095, like H.R. 1578, would:

- Help close gaps in health insurance coverage,
- Continue to provide similar protections for Federal employees and non-Federal employees,
- Eliminate distinctions between categories of military training and service,
- Make the law more understandable,
- Outlaw employer reprisals for claimants, and
- Assist recruitment and retention of reservists and members of the National Guard to support the Total Force Policy through better job protection.

We are in the process of analyzing the provisions in S. 1095 and comparing them to the Administration's proposal and the House-passed bill, H.R. 1578. We will supply written views on S. 1095 as soon as possible.

We can point out at this time that the Senate bill differs in some important areas from the House bill. The House bill, which we support, provides for up to 18 months of insurance coverage and the employee may be required to pay the entire cost. The House provision on insurance is similar to the continuation of health benefits required under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) for terminated employees: COBRA requires up to 18 months of continued coverage and specifies that beneficiaries may be required to pay the total cost of group coverage plus 2 percent for administrative costs.

We object to the Senate's requirement that all employers provide insurance for up to 18 months with the employee's payment not to exceed 102 percent of the premium required of other employees.

Another troublesome provision of the Senate bill requires all employers, private sector and the Federal Government, to provide annual leave with pay during the employee's period of absence for military service subject to the policy or practice of the employer. It is unclear whether provision of leave is guided by the employer's policies with respect to other employees on leave of absence or furlough, or whether accrual of leave is guided by the employer's policy for employees in active work status. We support the House bill on this issue, which would entitle employees absent for service in the uniformed services to the same accrual of leave that other employees on furlough or leave of absence have.

S. 1095 would increase direct spending; therefore it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990 (OBRA). Offsets to the direct spending must be included as required by OBRA. The OMB is working on an estimate of the direct spending impact of the bill.

We have some other suggestions for changes to the bill which can provide further improvements. H.R. 1578, which the Administration supports, applies VRR protections to all seven uniformed services, which include the five Armed Forces plus the Public Health Service and the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA).

The House bill also covers the Merchant Marine Service "when deemed necessary by the Secretary of Defense in the interests of national defense." During Operation Desert Shield/Storm, the Nation called upon experienced seamen to leave their jobs in other lines of work to operate vessels carrying military cargo to the Persian Gulf area. The Department of Defense and the Department of Transportation have informed us that according reemployment rights to such persons would be very helpful in ensuring their availability if they are needed again.

We would also point out that S. 1095 omits the House-passed provision authorizing the President to designate any other category of persons a "uniformed service" during time of war or national emergency. During World War II, particularly, some persons (e.g., Women's Air Service Pilots) who were considered civilians performed important, arduous, and dangerous service under military-like conditions. It is important that the President have the authority to address these situations as they arise without having to ask Congress for special legislation.

Another area of concern involves pensions. The language of S. 1095 needs some clarification in this area. Without change the pension language could lead to unintended results with regard to the crediting of service for benefit accrual purposes under those plans where contributions are related to current services. Employer contributions to "defined contribution" plans are commonly set as a percentage of pay. Requiring crediting of service for benefit accrual purposes would have no real meaning in this context and could lead to confusion in interpretation.

In addition, the intelligence community agencies have some concerns regarding the enforcement procedures involving their employees. The Administration will submit language to resolve this concern.

There also is a section in the proposed Senate bill which requires the Department, through my office, to undertake an outreach or public information campaign to inform veterans of their reemployment rights. Such a requirement is an unnecessary repetition of a vigorous, on-going public information campaign that the Secretary initiated several months ago and that has already exceeded our expectations in terms of its success. These efforts include national radio and television Public Service Announcements featuring Secretary of Labor Lynn Martin and General Colin Powell, as well as flyers, fact sheets and the establishment of a toll-free hotline for veterans' reemployment rights information. (1-800-442-2VET.) This statutory requirement would add little to efforts already undertaken but could negatively impact on our abilities to undertake other needed activities.

In conclusion, we look forward to working with the Committee to clarify and simplify the current veterans' reemployment rights statute and to resolve the issues I have addressed.

PREPARED STATEMENT OF

HONORABLE STEPHEN M. DUNCAN
ASSISTANT SECRETARY OF DEFENSE FOR
RESERVE AFFAIRS

HEARING BEFORE THE
COMMITTEE ON VETERAN'S AFFAIRS
UNITED STATES SENATE
ON EDUCATION AND EMPLOYMENT LEGISLATION

MAY 23, 1991

Mr. Chairman and Members of the Committee.

I am very pleased to appear before you today to discuss the proposed legislation which would amend Chapter 43 to Title 38 of the United States Code, involving reemployment rights of military veterans. As you have requested, I will also comment on S. 868, a bill to improve educational assistance benefits for members of the Armed Forces who were called to active duty in support of the Persian Gulf conflict.

The fundamental right protected by the provisions of Chapter 43 is the right of reinstatement to employment following military service, including protection of seniority, status, and rate of pay. Statutory employment protections for members of the Armed Forces were first enacted just prior to the Second World War. Provisions extending employment protections to cover training in the Reserve components were added in 1951. Other important provisions affecting Reservists were added in 1960. In 1968, additional protection was adopted which prohibits discharge from employment or denial of promotion or other incidents of employment, because of an individual's membership in the Reserve components. An important provision prohibiting discrimination against Reservists in the hiring process were added in 1986.

These statutory provisions are of immense importance to the Department of Defense generally and to the members of the uniformed services in particular. They are especially important to members of the National Guard and federal Reserve forces. Over 80 percent of the enlisted members of the Selected Reserve and nearly 90 percent of the officers are employed in the civilian sector. Whatever incentives may be put in place to encourage recruitment and retention in the Reserve components, the incentives are almost certain to be inadequate if Reservists are not confident that their military service will not result in the loss of their full-time civilian employment.

The progressive piecemeal changes which have been made to the current Veterans' Reemployment Rights statute, changing circumstances and requirements associated with military duty, and new laws and practices covering pension plans and health benefits, have made the current statute complex and difficult to interpret. To the extent that ambiguities exist, they have potentially serious consequences with respect to the basic right provided by the statute -- reinstatement to previous employment following military service. Indeed, on February 19, 1991, the U.S. Supreme Court agreed to consider a case involving the reemployment rights of a Reservist because of an ambiguity in the current statute. The issue in question has been decided differently by the federal circuit courts of appeals.

As a former Assistant United States Attorney, I have had first-hand experience in representing the government in cases where ambiguities of law raise doubts about the intent of Congress. Consequently, I believe that a revision to the current statute is required to ensure that we can continue to meet the original intent of Congress in establishing reemployment rights for veterans -- i.e., the elimination of disincentives to military service caused by a fear of loss of civilian employment opportunities.

Recognizing that progressive changes in the statute coupled with changing circumstances of military duty have resulted in a law which needs comprehensive revision, an Interagency Committee was formed in 1987 to review the current law and to recommend legislative changes. Representatives from the Departments of Defense, Labor, Justice, and Veterans Affairs joined in the effort. The proposed legislation which is the product of the Interagency Committee has received a detailed review within the Administration. The result of this extended and concentrated effort is the proposed "Uniformed Services Employment Rights Act of 1991," which was forwarded to the Congress this March.

Last week H.R. 1578, which encompasses the essence of the Administration's proposal, was passed unanimously by the House of Representatives. We have also reviewed S. 1095, the bill which you introduced last week to clarify and improve the Veteran's Reemployment Rights law. While S. 1095 differs in format from the Administration's proposal, it is not, in our view, at variance with the Administration's proposal on most important matters of substance. There are a number of technical issues which we believe should be addressed in furtherance of the most effective and efficient operation of the law, however. I would ask that we be allowed to provide these technical concerns for the record.

It is important to note that the proposed legislation would apply to members of all seven uniformed Services who return to civilian life after military duty or training, not just Reservists. We believe it important that all seven uniformed Services be covered by the statute and that there be stand-by provisions to provide employment protections to the Merchant Marine in certain emergency situations. I have been informed by the Department of Labor, however, that the great majority of the cases which it handles involve Reservists. Moreover, the cases involving Reservists are among the most complex.

In considering these matters, Congress has concluded that "the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." I agree. The Department of Defense also subscribes to the view of Congress that enthusiastic voluntary cooperation and support from employers is critical to successful Reserve programs, but that statutory protections and an enforcement mechanism form a necessary foundation for this cooperation.

It was for the purpose of fostering cooperation, understanding and voluntary support by employers of their employee-Reservists that the National Committee for Employer Support of the Guard and Reserve, an agency within my office, was originally established. Through effective communication of the role and importance of Reserve forces within the Total Force, we believe that we can gain the support of employers in establishing personnel policies and practices that will encourage, or at least not obstruct participation by their employees in Reserve programs.

The National Committee is a grass roots organization which supports state-level Employer Support Committees, involving over 3,700 volunteers who are influential members of local business, labor, and professional communities in all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and Saipan. The National Committee develops public information programs, including television and radio spots which are directed at employers, supervisors and the public to increase the understanding of the role of National Guardsmen and Reservists in the Total Force and the importance of military training time. The Committee establishes contacts with professional, business and labor associations and seeks to obtain official statements of support from associations and their member firms.

The National Committee also works to foster understanding of the legal rights and obligations of both citizen-soldiers and their employers. During Operations DESERT SHIELD/STORM, additional telephone banks and a 24-hour telephone watch were established to answer a wide range of questions from both Reservists and employers. Volunteer civilian members of the National Committee in the individual states were asked to visit mobilization sites to answer questions about employer-related matters. Difficult or complex questions were referred to representatives of the Department of Labor.

The great majority of employers want to do what is right and are supportive of their employee-Reservists who join and serve in the Armed Forces. During Operations DESERT SHIELD/STORM, many employers have gone far beyond what the law requires in support of their employee-Reservists who have been activated. The proposed statute which we are discussing this morning would serve as an important reference point for such support.

Permit me to briefly outline what I believe to be some of the most important features of our proposal. First it would eliminate distinctions in the protections offered under the law based on categories of persons or types of duty. Many of the existing distinctions are no longer warranted, nor are they relevant to the employment relationship. Under existing law, for example, those persons who enter active duty for a period of less than four years have 90 days within which to apply for reinstatement with their former employer. Reservists entering training duty (other than initial active duty for training in excess of 12 consecutive weeks), must report for work at the next scheduled work period after their return. Those who perform initial active duty in excess of 12 weeks or are ordered to active duty under section 673b of Title 10, United States Code, for any period of time, have 31 days within which to apply for reemployment.

These distinctions are unlikely to be of concern to employers. The most significant factor to an employer is the length of time the employee is absent. Under the proposed revision, the time period which the returning servicemember will have in which to report to his or her preservice employer will depend upon the duration of the service or training. For example, a member whose service was for fewer than 31 days will be required to report to work on the first day after completion of the service. If the service was 181 days or more, the member will have up to 90 days to request reemployment and report for work. This will be easier to understand and apply.

Second, the proposed legislation would clear up existing confusion on the length of military training that is protected. The current statute protects the employment of Reservists who perform military training duty but it does not expressly address the timing, frequency or duration of the training. The federal courts of appeals are divided on the proper interpretation of the law on this point. It is self evident that a Reservist must know with certainty when he or she complies with orders to military training duty that the legitimacy of the orders with respect to the timing, frequency or duration of training will not be questioned. The legislation proposed by the Administration, and in slightly different form that passed by the House of Representatives, would eliminate the confusion on this point.

A third important feature of the proposed legislation would be its clarification of the existing coverage of federal employees. The amendments to Title 38 of the United States Code would reiterate that the reemployment obligation applies to the federal government just as it applies to any other employer. The Administration proposal would add a new Chapter 92 to Title 5 of the Code. The proposed new chapter would make it clear that the federal government should be a model employer with respect to the purposes and policies set out in the employment rights law for members of the uniformed services. It would also clarify appellate procedures under which federal employees could seek to enforce reemployment rights if a federal agency were to fail or refuse to comply with it obligations under the law. In this respect, we believe that representation of Federal employees by the Office of Special Counsel (OSC) should be limited to the Merit Systems Protection Board Representation of Federal employees by the OSC in Federal Courts, in section 4333(e) of S. 1095 is not, in our view, warranted.

The final feature of the proposed legislation which I want to note here is its treatment of health and pension benefits. The importance of these benefits has greatly increased since the last major revision to the Veterans' Reemployment Rights statute. During this period of time, other federal laws, such as the Employee Retirement Income Security Act (ERISA) and the Consolidated Omnibus Budget Reconciliation Act (COBRA), have been enacted. The proposed legislation would set out clear and reasonable rules relating to these benefits which are fair and consistent with other legislation in the benefits area. It would also ensure that National Guardsmen and Reservists do not lose health or life insurance benefits, for themselves or their dependents, because of the performance of short tours of training duty. The provisions of the legislation which relate to health benefits would, in my judgment, effectively complement those provisions relating to health insurance reinstatement upon reemployment that were included in the Soldiers' and Sailors' Civil Relief Act Amendments of 1991 which was enacted on March 18.

There are many other positive features of the legislation which we have proposed and which you are considering today. As I indicated earlier, I believe the bill which you introduced last week is consistent in intent and generally consistent in substance, Mr. Chairman, with the proposal submitted by the Administration. I believe the provisions of this legislation will provide important protections not only for the thousands of

National Guardsmen and Reservists who have served during Operations DESERT SHIELD/STORM, but also for those citizen-soldiers, sailors, Marines, airmen, and coast guardsmen who will continue to be a critically important part of the Total Force in the future.

Finally, Mr. Chairman, and with reference to all members of the Armed Forces who served in support of the conflict in the Persian Gulf, I believe that the provisions of S. 868 which you have introduced would add important protection with respect to unanticipated consequences of military service on educational assistance benefits. I would offer only two suggestions in the interest of perfecting this proposal. First, I believe that its provisions should include all members ordered to active duty in support of Operations DESERT SHIELD/STORM. This would then include members of the Individual Ready Reserve and Retired members within the provisions of the bill. Secondly, I would recommend that the provisions of Section 2 of the bill, with respect to the delimiting date, be modified. We would suggest that it provide that a member whose eligibility for educational assistance under the provision of Chapter 30 of Title 10, United States Code, is affected as the result of the member's active service in support of the Persian Gulf conflict, be granted an additional period of eligibility equal to the length of such service, if needed. This approach, while accomplishing the objective you intend, would preclude the imposition of an additional administrative burden on the Selected Reserve educational assistance program which is already overburdened.

STATEMENT OF STUART E. SCHIFFER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

HEARING

BEFORE THE

COMMITTEE ON
VETERANS AFFAIRS

UNITED STATES SENATE

REGARDING S. 1095, THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1991

MAY 23, 1991

Mr. Chairman and Members of the Committee:

We appreciate the opportunity to provide our views on S. 1095, the "Uniformed Services Employment and Reemployment Rights Act of 1991," which would amend Chapter 43 of Title 38, United States Code (Veterans Reemployment Rights). We welcome the Committee's interest in this important area, which is especially timely in light of the recent successful efforts of our military forces in the Persian Gulf.

As you know, the Administration submitted to the Congress, in March 1991, a bill to amend the Veterans Reemployment Rights ("VRR") statute. And, on May 14, 1991, the House of Representatives passed its own version of that bill, H.R. 1578, the "Uniformed Services Employment and Reemployment Rights Act of 1991." Although different in some relatively minor respects, H.R. 1578 closely resembles the Administration's bill, which the Department of Justice fully supports.

The present VRR statute (38 U.S.C. §§ 2021-2026) was first enacted shortly before World War II and has been amended many times over the years. The fundamental right provided by the law for veterans, reservists, and National Guard members is the right to reinstatement to their former positions, as if they had never left, following completion of active duty military service or training.

The Department of Justice and our United States Attorneys, together with the Department of Labor, have been closely involved with the implementation of VRR rights since, if disputes with private sector employers cannot be amicably resolved (and, by far, most of them are), the statute gives a right to the service member to have the Department of Justice represent him or her in a court action against the employer.

Problems have arisen with the implementation of the current statute, particularly in the area of reemployment rights for reservists, since our military has increasingly relied upon the use of reservists in recent years. Years ago, reservists and National Guard members usually performed their training on weekends and at two-week summer camps. Now, they are often required to spend several months or years in training and, as in Operation Desert Storm, may be called up for extended periods of active duty service.

In some cases, employers have objected to extended absences for reservists and guard members. A good example of this is a recent case involving a request by "Sky" King, a sergeant major in the Alabama National Guard, for a three-year leave of absence from his employer to become the State Command Sergeant Major, a full-time position requiring a three-year commitment. The United States Court of Appeals for the Eleventh Circuit held that a three-year leave of absence is *per se* unreasonable and that the employer had no obligation under the VRR statute to grant such a leave request. *King v. St. Vincent's Hospital*, 901 F.2d 1068 (11th Cir. 1990), *cert*. *granted*, 59 U.S.L.W. 3545 (U.S. Feb. 19, 1991)(No. 90-889).

Other courts have also applied a "reasonableness" test to determine whether a leave of absence requested by a reservist or guard member is allowable. See, e.g., Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987); Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981). But see Kolkhorst v. Tilghman, 897 F.2d 1282 (4th Cir. 1990).

At our request, the Supreme Court granted certiorari to hear the King case. We believe the case was wrongly decided since, in our view, under the existing VRR statute, courts should not impose their own concepts of "reasonableness" on the length of leaves of absence which military necessity may require for reservists and guard members. Cases such as the King case and others, however, have highlighted features in the existing VRR statute that are not well-adapted to the modern "total force policy," which is dependent upon the reserve components, including the National Guard, for essential military readiness.

In recognition of the need to modernize the existing VRR statute, an interagency Task Force was formed in 1987 to review the current law and to recommend changes which would preserve and maintain the basic rights of the existing statute, but which would clarify, strengthen, and modernize the law. The Departments of Defense, Labor, Justice, and Veterans Affairs, and other interested agencies participated in the effort. The Administration's bill is the product of this effort. We believe that the bill would help avoid litigation where possible or, at least, make such litigation less expensive and time-consuming for veterans and employers alike. We also believe that passage of an updated and modernized VRR bill would significantly aid our representation of veterans in court when that becomes necessary.

Many of the provisions of the Administration's bill are included in S. 1095, which we largely agree with and believe would reduce and simplify litigation of VRR cases. We do, however, have certain objections to S. 1095 in its present form which are important to point out to the Committee.

First, we object to section 4333(e), which provides that federal employees may be represented by the Office of Special Counsel ("OSC") before both the Merit Systems Protection Board ("MSPB") and the federal courts in appeals from MSPB decisions. The proposal for OSC representation of federal employees would create a serious conflict of interest for OSC attorneys because their employer -- the executive branch -- would be the defendant in the suit. Moreover, the OSC representation of the employee could create the constitutionally troubling impression that the executive branch was taking inconsistent positions before an Article III tribunal. There is no comparable provision in the law providing for OSC representation of federal employees in any other type of case. While the OSC has authority, under 5 U.S.C. § 1212, to prosecute actions before the MSPB against federal agencies and individual federal employees engaging in prohibited personnel practices, those actions are brought in the name of the OSC, not in the name of aggrieved employees. OSC's role in such cases is prosecutorial; it institutes MSPB actions to enforce the law, but does not act as attorney for the aggrieved individuals. And the OSC has no right of appeal to the federal courts from an adverse board decision in such cases. Although the aggrieved employee may appeal from the board's decision, he must do so pro se or retain private counsel.

While we fully support the notion that the Federal Government should be a model employer with respect to VRR rights, federal employees are adequately protected by section 2029 of the Administration's bill (which provides for OSC representation before the MSPB, but not before the federal courts), and also by the general obligation of federal agencies to cooperate with each other in complying with Congressional mandates. The Executive Branch has been very successful in resolving the complaints of its employees. We understand that, over the past decade, only a handful of VRR cases have been brought before the MSPB under the existing procedures set forth at 5 C.F.R. § 353. We should also note that section 2043 of H.R. 1578 is consistent with section 2029 of the Administration's bill. It provides for OSC representation of federal employees in actions before the MSPB, but not before the federal courts. We urge deletion of section 4333(e) of S. 1095. The Committee should adopt the Administration's proposal with respect to the representation of federal employees claiming entitlement to VRR benefits.

Second, S. 1095, in sections 4333(c)(4) and 4334(c)(2)(B), authorizes the MSPB and the district courts, respectively, to award attorney fees (and other litigation expenses) to prevailing

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employees. We do not believe that these fee provisions are necessary, since federal representation would be available, at no cost, to employees with meritorious cases. In addition, such fee provisions may encourage litigation that could otherwise be avoided. Aggrieved employees may choose to retain private counsel and institute lawsuits, rather than seek the assistance of the Department of Labor, which has historically had a high rate of success in resolving these disputes amicably and obtaining voluntary compliance with the law.

We should also note that section 4333(c)(4) authorizes the MSPB to award attorney fees to a federal employee whether he is represented by the OSC or private counsel, while section 4334(c)(2)(B) authorizes the district courts to award fees only when the employee is represented by private counsel, and not when represented by the Department of Justice. This appears inconsistent.

Third, we urge the Committee to adopt section 2022(a) of the Administration's bill. That provision states that:

> The provisions of this chapter are intended to be liberally construed in favor of persons with entitlements under this chapter and to be interpreted according to their plain and common meaning, except as specifically provided herein.

This language is intended to codify the statement of the Supreme Court that the VRR statute should be "liberally construed for the benefit of those who left private life to serve their country." Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 285 (1946). Section 2022(a) of the Administration's bill appropriately reflects the view of the courts that VRR legislation should be construed in favor of veterans. This provision should be included in the Committee's bill, as it will undoubtedly assist us when litigation is necessary.

Finally, we also urge the Committee to adopt the definition of "uniformed services" set forth in section 2023(11) of the Administration's bill and in section 2023(12) of H.R. 1578. The definition of "uniformed services" contained in S. 1095 at section 4303(9) is significantly narrower than that set out in the Administration's bill. Section 4303(9), for example, does not include the Merchant Marine or the commissioned corps of the National Oceanic and Atmospheric Administration, and it does not provide for the inclusion of other categories of persons as designated by the President in time of war or national emergency.

Thank you for this opportunity to present our views.

STATEMENT OF
HONORABLE CONSTANCE BERRY NEWMAN
DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

before the

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

at a hearing on

S. 1095, TO AMEND THE VETERANS REEMPLOYMENT RIGHTS LAW

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR INVITING ME TO JOIN YOU TODAY TO DISCUSS S. 1095, THE "UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1991."

S. 1095 WOULD REVISE AND RESTRUCTURE THE 50-YEAR-OLD VETERANS' REEMPLOYMENT RIGHTS (VRR) LAW WHICH PROTECTS EMPLOYMENT INTERESTS WHEN A CIVILIAN IS ABSENT TO PERFORM ACTIVE MILITARY DUTY OR TRAINING. AS COULD BE EXPECTED WITH ANY LONG-STANDING LAW, VRR PROVISIONS HAVE BEEN AMENDED REPEATEDLY OVER THE YEARS AND HAVE BEEN SUBJECT TO NUMEROUS JUDICIAL INTERPRETATIONS, SO THAT THEY HAVE BECOME DIFFICULT AND CUMBERSOME TO ADMINISTER. ESSENTIALLY, S. 1095 PROPOSES A COMPREHENSIVE REFORM OF THE VRR LAW TO: ESTABLISH UNIFORM DEFINITIONS OF RIGHTS AND BENEFITS, SIMPLIFY THE DETERMINATION OF ELIGIBILITY AND ENTITLEMENTS, AND CLARIFY AND IMPROVE PROCEDURES FOR ENSURING TIMELY COMPLIANCE WITH THE LAW.

EARLY THIS YEAR, THE DEPARTMENT OF LABOR TRANSMITTED A LEGISLATIVE PROPOSAL TO CONGRESS WITH THE SIMILAR PURPOSE OF STRENGTHENING AND CLARIFYING STATUTORY EMPLOYMENT PROTECTIONS FOR VETERANS. ON MAY 14th, THE HOUSE PASSED H.R. 1578, WHICH SHARES THE PURPOSE OF S. 1095. THE ADMINISTRATION EXPRESSED STRONG SUPPORT FOR PASSAGE OF H.R. 1578.

OPM STRONGLY SUPPORTS EFFORTS TO MAKE THE STATUTORY EMPLOYMENT PROTECTIONS FOR VETERANS AND RESERVISTS STRONGER AND CLEARER. I WILL GENERALLY DEFER TO THE DEPARTMENT OF LABOR FOR A FULLER ANALYSIS OF THE DETAILS OF, AND THE DIFFERENCES BETWEEN, THE SENATE AND HOUSE PROPOSALS FOR AMENDING THE VRR LAW.

I WOULD NOTE A SERIOUS CONCERN WITH SEVERAL PROVISIONS OF S. 1095 RELATED TO CIVILIAN EMPLOYEE FRINGE BENEFIT PROTECTIONS DURING ABSENCES FOR ACTIVE MILITARY DUTY THAT GO BEYOND PRESENT FEDERAL PERSONNEL LAWS. IN THE AREAS OF HEALTH AND LIFE INSURANCE, FOR EXAMPLE, THE BILL WOULD REQUIRE CONTINUATION OF FEDERAL EMPLOYEES HEALTH AND LIFE INSURANCE COVERAGE, WITH GOVERNMENT CONTRIBUTION, FOR 18 MONTHS IN LIEU OF THE 12 MONTHS CURRENTLY AVAILABLE TO EMPLOYEES ON LEAVE WITHOUT PAY. THE BILL ALSO ENTITLES EMPLOYEES TO ACCRUE AND USE ADDITIONAL ANNUAL LEAVE DURING ABSENCES FOR MILITARY SERVICE. FINALLY, THE BILL WOULD

REDUCE THE DEPOSIT THAT IS NOW REQUIRED FOR MILITARY SERVICE CREDIT UNDER THE FEDERAL EMPLOYEES' RETIREMENT SYSTEM.

S. 1095 WOULD INCREASE DIRECT SPENDING. THEREFORE, IT IS SUBJECT TO THE PAY-AS-YOU-GO REQUIREMENT OF THE OMNIBUS BUDGET RECONCILIATION ACT OF 1990. OFFSETS TO THE DIRECT SPENDING MUST BE INCLUDED AS REQUIRED BY THAT ACT. OMB IS WORKING ON AN ESTIMATE OF THE DIRECT SPENDING IMPACT OF THE BILL.

THE FEDERAL GOVERNMENT, AS AN EMPLOYER, HAS A LONG-STANDING TRADITION OF SUPPORT TO AND ENCOURAGEMENT OF EMPLOYEES IN OUR RESERVE SYSTEM AND HAS A REPUTATION FOR ALREADY OFFERING CONSIDERABLY MORE BENEFITS TO RESERVISTS THAN MANY EMPLOYERS.

AS YOU KNOW, EMPLOYEES ARE ENTITLED TO BE REEMPLOYED IN THE POSITION THEY LEFT, OR AN EQUIVALENT POSITION IN THE AGENCY. THEY RETAIN ALL THE RIGHTS AND BENEFITS WHEN THEY RETURN THAT THEY WOULD HAVE HAD IF THEY HAD NEVER LEFT.

TO ENSURE THAT THESE RIGHTS ARE PROVIDED, THE MERIT SYSTEMS PROTECTION BOARD (MSPB) EXERCISES THE RESPONSIBILITIES OF THE FORMER CIVIL SERVICE COMMISSION TO HEAR ANY APPEALS ARISING FROM EMPLOYEES WHO FEEL THAT THEY HAVE NOT RECEIVED ANY OF THE RIGHTS PROVIDED BY LAW. HISTORICALLY, VERY FEW

APPEALS HAVE ARISEN, AND THOSE THAT HAVE ARE ALMOST ALWAYS THE RESULT OF MISUNDERSTANDING RATHER THAN MALICE. THE SMALL NUMBER OF CASES IS QUITE SIGNIFICANT, GIVEN THE FACT THAT FEDERAL EMPLOYEES MAKE UP A VERY LARGE PORTION OF THE RESERVES--AN ESTIMATED 10 PERCENT.

OPM DOES HAVE A ROLE IN HELPING FEDERAL AGENCIES UNDERSTAND THEIR OBLIGATIONS TO EMPLOYEES RETURNING FROM MILITARY DUTY, AND IN INFORMING EMPLOYEES OF THEIR RIGHTS. WE HAVE EXTENSIVELY REVISED, UPDATED, AND CLARIFIED OUR INFORMATIONAL MATERIALS IN THIS AREA IN THE LAST SEVERAL YEARS.

IN RESPONSE TO THE MASSIVE DEPLOYMENT OF RESERVISTS TO THE PERSIAN GULF, OPM HAS INCREASED OUR COMMITMENT TO ENSURING THAT THE FEDERAL GOVERNMENT FUNCTIONS AS A MODEL EMPLOYER WITH RESPECT TO VETERANS' EMPLOYMENT PROTECTIONS. THIS COMMITMENT HAS EXCEEDED THE USUAL REQUIREMENTS OF VRR LAW IN SEVERAL RESPECTS.

FOLLOWING THE PRESIDENT'S DECISION ON AUGUST 22, 1990, TO CALL CERTAIN MEMBERS OF THE ARMED FORCES RESERVES TO ACTIVE DUTY, OPM ISSUED A GOVERNMENTWIDE MEMORANDUM TO REMIND AGENCIES OF THEIR VRR OBLIGATIONS AND URGE THEM TO MAKE CERTAIN THAT AFFECTED EMPLOYEES WERE REASSURED ABOUT THEIR EMPLOYMENT PROTECTIONS BEFORE THEY LEFT FOR MILITARY DUTY.

OPM URGED AGENCIES TO RETAIN ABSENT RESERVISTS IN THEIR OWN POSITIONS ON THE AGENCY ROLLS RATHER THAN SEPARATE THEM WITH REEMPLOYMENT RIGHTS. THIS ALLOWS THE EMPLOYEES TO CONTINUE TO RECEIVE PAY FOR THE DURATION OF THEIR MILITARY OR ANNUAL LEAVE, AND THEY PRESERVE THEIR FEDERAL EMPLOYEE HEALTH AND LIFE INSURANCE ELIGIBILITY FOR UP TO THE FULL YEAR PERMITTED BY APPLICABLE LAWS FOR EMPLOYEES ON LEAVE WITHOUT PAY.

FURTHER, OPM ISSUED INTERIM REGULATIONS THAT WAIVED THE EMPLOYEE SHARE OF FEDERAL EMPLOYEES HEALTH BENEFITS PREMIUMS FOR EMPLOYEES WHILE THEY ARE ON MILITARY DUTY IN SUPPORT OF OPERATION DESERT SHIELD AND DESERT STORM.

WHEN THE PERSIAN GULF CONFLICT CLAIMED THE FIRST AMERICAN CASUALTIES, OPM ESTABLISHED SPECIAL PROCEDURES TO EXPEDITE PROCESSING OF SURVIVOR BENEFITS FOR THE FAMILIES OF ANY FEDERAL EMPLOYEE WHO MIGHT NOT RETURN. WE ONLY HAD TO EMPLOY THESE PROCEDURES IN FOUR CASES, BUT AT LEAST WE WERE ABLE TO PROVIDE ESPECIALLY RESPONSIVE SERVICE TO THE FAMILIES OF THESE EMPLOYEES.

IN ADDITION TO OPM'S OWN INITIATIVES TO PROMOTE THE FULLEST PROTECTION OF EMPLOYMENT INTERESTS FOR FEDERAL EMPLOYEES PARTICIPATING IN THE PERSIAN GULF WAR, WE HAVE ACCORDED HIGH PRIORITY TO IMPLEMENTATION OF RECENT PRESIDENTIAL AND CON-

GRESSIONAL INITIATIVES TO PROVIDE SPECIAL RECOGNITION FOR VETERANS AS THEY RESUME CIVILIAN LIFE.

ON MARCH 8, 1991, PRESIDENT BUSH SENT A MEMORANDUM TO THE HEADS OF EXECUTIVE AGENCIES HIGHLIGHTING THE RESPONSIBILITY OF CIVILIAN EMPLOYERS TO EASE THE RETURN OF RESERVISTS TO CIVILIAN LIFE AND SETTING FORTH SOME APPROPRIATE ACTIONS FEDERAL AGENCIES SHOULD TAKE TO SET A NATIONAL EXAMPLE. IN ADDITION TO REINFORCING OUR PREVIOUS GUIDANCE CONCERNING GUARANTEED RESTORATION TO THE EXACT POSITION AN EMPLOYEE LEFT TO ENTER ACTIVE MILITARY DUTY, THE MEMORANDUM AUTHORIZED FIVE DAYS OF PAID ABSENCE WITHOUT CHARGE TO LEAVE FOLLOWING RESTORATION TO CIVILIAN EMPLOYMENT. FURTHER, IT DIRECTED OPM TO ENSURE THAT FEDERAL EMPLOYMENT OPPORTUNITIES ARE AVAILABLE TO THE GREATEST EXTENT POSSIBLE FOR ALL VETERANS AND IN PARTICULAR ANY WHO SUFFER SERVICE-RELATED DISABILITY.

BY EXECUTIVE ORDER 12754, THE PRESIDENT AUTHORIZED VETERANS PREFERENCE FOR PERSONNEL SERVING IN DESERT SHIELD AND DESERT STORM OPERATIONS IN SOUTHWEST ASIA ON OR AFTER AUGUST 2, 1990. MOREOVER, MANY VETERANS WHO ARE NOT FEDERALLY EMPLOYED WILL QUALIFY FOR GOVERNMENT APPOINTMENT WITHOUT HAVING TO TAKE CIVIL SERVICE EXAMINATIONS UNDER THE EXPANDED VETERANS READJUSTMENT APPOINTMENT (VRA) AUTHORITY, ENACTED BY PUBLIC LAW 102-16, SIGNED MARCH 22, 1991.

WE HAVE PREPARED DETAILED GUIDANCE FOR AGENCIES CONCERNING DETERMINATION AND DOCUMENTATION OF VETERANS PREFERENCE ELIGIBILITY FOR GULF WAR PARTICIPANTS AND THE NEW VRA AUTHORITY AND WE ARE INAUGURATING A GOVERNMENTWIDE NETWORK OF OPM CONTACTS TO HANDLE INQUIRIES ON VETERANS BENEFITS.

MOST RECENTLY, PUBLIC LAW 102-25 DIRECTED OPM TO ISSUE REGULATIONS ESTABLISHING A GOVERNMENTWIDE RESERVIST LEAVE BANK PROGRAM. THIS PROGRAM ALLOWS FEDERAL EMPLOYEES TO DONATE A PORTION OF THEIR ANNUAL LEAVE FOR USE BY OTHER FEDERAL EMPLOYEES WHEN THEY RETURN TO CIVILIAN SERVICE FOLLOWING ACTIVE DUTY IN THE ARMED FORCES DURING THE PERSIAN GULF CONFLICT. INTERIM REGULATIONS WERE ISSUED EARLIER THIS MONTH AND OPM HAS DISTRIBUTED ADDITIONAL GUIDANCE FOR AGENCY USE IN IMPLEMENTING THE PROGRAM.

OPM IS COMMITTED TO CONTINUING THE FULLEST SUPPORT OF VETERANS NOW RETURNING FROM THE GULF. GIVEN THE LARGE NUMBERS OF FEDERAL EMPLOYEES WHO WERE CALLED TO ACTIVE DUTY AND THE FACT THAT MANY HOLD KEY POSITIONS IN THEIR AGENCIES, OUR EFFORTS TO ENSURE MAXIMUM PROTECTION OF THEIR EMPLOYMENT RIGHTS AND BENEFITS HAVE REQUIRED CONSIDERABLE CREATIVE PROBLEM-SOLVING ON THE PART OF AGENCIES IN CONTINUING TO CARRY OUT THEIR RESPONSIBILITIES. HOWEVER, WE BELIEVE THAT OUR CITIZEN/SOLDIERS WHO HAVE SERVED TO PRESERVE FREEDOM IN THE PERSIAN GULF DESERVE NO LESS.

I WOULD BE GLAD TO RESPOND TO ANY QUESTIONS YOU HAVE AT THIS TIME.

STATEMENT OF
HONORABLE FRANK Q. NEBEKER
CHIEF JUDGE, UNITED STATES COURT OF VETERANS APPEALS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
MAY 23, 1991

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the Court, I appreciate this opportunity to comment on pending legislation affecting the operations of the Court. My comments will focus primarily on section 4 of H.R. 153, which would authorize the Court to establish judicial discipline procedures. I will also briefly address S. 1050, which you were kind enough to introduce on behalf of the Court. Before I address either S. 1050 or section 4 of H.R. 153, however, permit me to make two brief preliminary comments, one concerning H.R. 153 in general, and one directed to a specific provision.

First, I can state that the Court endorses all provisions of H.R. 153. Second, I would like to comment briefly on section 3 of H.R. 153, which establishes a judicial pay structure consistent with that of all other Article I and Article III courts, including the U.S. Court of Military Appeals. The pay structure of those courts recognizes the principle of equal pay for equal work. I initially recommended such action on June 8, 1989, and believe that the provision now under consideration is consistent with the intent of the legislation that created the Court. In view of this Court's appellate status, I believe that a salary level commensurate with that of the Court of Military Appeals is the most appropriate one.

Third, the Court appreciates your courtesy in giving such prompt consideration to S. 1050. We again endorse this proposal, transmitted to the Committee on April 18, 1991. S. 1050 would amend section 4081 of title 38 by adding a new subsection (i), which would permit the Court to accept voluntary services and gifts of personal property. The new subsection (i) would permit the Court, generally in cooperation with educational institutions, to establish unpaid law student intern and extern programs similar to those operated by other federal courts. After having been approached by law schools and individual students, we have noted that the Court is not covered by any exception to the statutory limitation on voluntary services contained in section 1342 of title 31. Proposed subsection (i) would create such an exception. It would incorporate the language of section 604(a)(17) of title 28, which grants authority to the Director of the Administrative Office of the United States Courts (AO) to accept such services on behalf of Article III courts.

Other language in proposed subsection (i) anticipates the likelihood that gifts or bequests, particularly of books or works of art, will be made to this Court as they have to other courts. The provision would grant authority to the Court to accept such gifts or bequests. The proposed language also parallels language in section 604(a)(17), that grants similar authority to the Director of the AO.

I turn now to section 4. Section 4 of H.R. 153 would add a new subsection (g) to section 4053 of title 38. Subsection (g) would authorize the Court to establish procedures consistent with those of section 372(c) of title 28 for the filing of complaints about alleged conduct of any judge of the Court and for the investigation and resolution of such complaints. I would like to make two points concerning section 4 of H.R. 153. My first point is that the Court endorses section 4 because it provides the authority necessary for the Court to establish a judicial discipline procedure. My second point is that the Court believes that further statutory amendment is necessary and desirable to provide for appeal to judicial entities outside the Court, as is permitted with respect to judicial discipline actions of the Claims Court under sections 176, 331, and 372(c) of title 28.

Without the enactment of provisions such as those in section 4 of H.R. 153, we believe that this Court, as an Article I court, has no clear authority to establish judicial discipline procedures.

Judicial discipline procedures under title 28 clearly apply to the judges of the U.S. district courts, the twelve regional circuit courts of appeals, and three other courts identified specifically in what had been paragraph (17) -- now redesignated as paragraph (18) -- of section 372(c) of title 28. The three courts are two Article III courts -- the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade -- and a single Article I court -- the U.S. Claims Court. Paragraph (18) requires these courts to "prescribe rules consistent with" the provisions of section 372(c). Congress has apparently viewed legislation as the appropriate method for the establishment of a judicial complaint mechanism for Article III courts and for the Claims Court. Section 4 of H.R. 153 will provide the required statutory directive to the Court of Veterans Appeals.

Let me state as preface to my second point concerning section 4 that the Court has no objection to that section as presently drafted. The Court is prepared to move forward with its implementation. It can be implemented by the Court in a way substantially consistent with section 372(c) of title 28, and with the removal provisions of section 4053(f) of title 38.

Section 4053(f)(1) of title 38 currently provides for removal of the Court's judges by the President only "on grounds of misconduct, neglect of duty, or engaging in the practice of law." However, the Court notes that, with the exception of review by the

President in a removal case, it does not appear that the proposed legislation or existing law would authorize any process for independent review by an entity outside the Court of a Court disposition of a complaint. Such review is provided for in section 372(c)(4)-(10) of title 28 for certain courts specifically referenced in section 372(c). Review under these provisions occurs in a special committee of a regional judicial council, in the full judicial council, and through appeal of the council's action to the Judicial Conference of the United States by the complainant or respondent judge. Because the Court of Veterans Appeals is not referenced in section 372(c) of title 28, independent review of the Court's disciplinary actions by a judicial entity outside the Court itself does not appear to be available.

Accordingly, the Court favors an amendment to provide for such appeal. I am not prepared to recommend such action until I know the position of the Judicial Conference of the United States. However, providing for an appeal outside the Court itself would avoid any perception of partiality or unfairness.

It may be determined that such legislation requires formal action by the Senate Judiciary Committee and an amendment to title 28. In that event, while the process moves forward in the Congress regarding consideration of such a title 28 amendment, the Court is prepared to implement proposed subsection (g) if it is enacted as currently drafted in section 4 of H.R. 153. The Court is reviewing various options for implementation and will be prepared to proceed promptly to implement any judicial discipline legislation that is enacted.

In conclusion, I again thank you for this opportunity to present the Court's comments concerning the pending amendments to title 38. I want to express my gratitude, and that of all the Court's judges, officers, and employees, for this Committee's continuing support. We will be happy to answer any questions the Committee may have concerning the Court's comments.

STATEMENT OF

D'WAYNE GRAY

CHIEF BENEFITS DIRECTOR

DEPARTMENT OF VETERANS AFFAIRS

BEFORE THE

COMMITTEE ON VETERANS AFFAIRS

UNITED STATES SENATE

MAY 23, 1991

Mr. Chairman and members of the Committee:

Thank you for the opportunity to appear before the Committee to provide the views of the Department of Veterans Affairs (VA) on S. 868, legislation that you, Mr. Chairman, recently introduced to restore certain education benefits lost by members of the Armed Forces as a result of their active duty service during the Persian Gulf War. I am also pleased to relate, as requested, the Department's experience as an employer in implementing the veterans' reemployment rights provisions of chapter 43 of title 38 pertinent to reservists and National Guard members who served in connection with the Persian Gulf War.

2.

Mr. Chairman, it is unquestionably fitting that we provide the relief accorded by S. 868, as described below, so that no person who served on active duty during the Persian Gulf War loses, by reason of such service, any measure of the educational opportunity intended to be afforded by the educational benefits to which such person had established entitlement. Consequently, to the extent it affects benefits programs within our jurisdiction, we would support this measure.

However, Mr. Chairman, S. 868 would increase direct spending; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990 (OBRA). No offsets to the direct spending increases are provided in the bill. Although the Administration supports the substantive provisions of S. 868, I must note that such support is contingent upon the inclusion of offsets to the increases to direct spending contained in the bill as required by OBRA. The Office of Management and Budget's preliminary scoring estimates of this bill are $13 million for Fiscal Year 1995.

Section 1 of S. 868 provides for restoration of certain education benefit entitlement. It would amend chapters 30, 32, and 35 of title 38 and chapter 106 of title 10 to provide that any payment of educational assistance under those chapters to a member of the Selected Reserve would not be charged against the reservist's entitlement if he or she had to discontinue pursuit of education or training because of being ordered to active duty under section 672(a), (d), or (g), 673, or 673b of title 10 in connection with the Persian Gulf War. The provision would apply only to course pursuit for which the individual did not receive credit or lost training time toward completion of the approved educational, professional, or vocational objective.

The same section also would restore entitlement for members of the Armed Forces who had to discontinue course pursuit while on active duty as a result of being ordered, in connection with such War, to a new duty location or assignment or to perform an increased amount of work.

In addition, to effect the restoration of entitlement with respect to the chapter 32 contributory GI Bill (VEAP), the Department of Defense would restore, by deposit to the VEAP Fund on behalf of the participant, an amount equal to the entire amount of the payment made to the participant for the uncompleted course.

As previously indicated, we support the concept of this restoration. Among the sacrifices made by our young men and women in the Armed Forces who served on active duty during the

Persian Gulf hostilities was the disruption to their educational pursuit. Clearly, it would be neither fair nor prudent for the Government to allow such a disruption to cause a forfeiture of any portion of an individual's earned education benefits. Thus, except to the extent applicable to the chapter 32 and chapter 106 programs, on which we defer to the views of the Defense Department, we favor the enactment of this provision.

Section 2 of S. 868 amends title 10 to provide that a reservist called to active duty under section 672(a), (d), or (g), 673 or 673b of that title in connection with the Persian Gulf War would have that period of active duty excluded from his or her 10-year delimiting date. Further, such service would not be considered a separation from the Selected Reserve for delimiting date determination purposes.

Chapter 106 currently provides that educational assistance must be used within 10 years of the date on which the individual first became entitled or the date of separation from the Selected Reserve, whichever first occurs. Thus, the proposed amendment would replace the time lost from educational pursuit so as not to penalize the reservist who responded to the Country's call to active service as a result of Desert Shield/Storm operations.

VA fully supports the Defense Department's position that the period of an eligible Selected Reservist's active duty in connection with the Persian Gulf War should be excluded from his or her 10-year delimiting date under the chapter 106 Montgomery GI Bill program if necessary to insure the reservist's education benefits are not adversely affected by such service.

Mr. Chairman, before turning to VA's experience as an employer of reservists and National Guard members, I would first like to tell you how proud we in VA are of all of our employees who serve in the Armed Forces Reserves and with National Guard units. More than 3,500 VA employees were called to active duty in connection with the Persian Gulf War and thus far almost half have returned to their positions.

VA's experience with restoring employees to our employment rolls after their discharge from active duty military service has been very positive. They return to their civilian positions with renewed confidence and a desire to undertake more challenging tasks. Generally, employees going on active duty for 1 year or longer are separated from the Department and advised of their restoration rights. It is our policy to strive to restore returning employees whenever possible to the same positions in the facility where they last worked prior to their call to military service. If this is not possible, we place them in a position of comparable salary and status for which they are qualified.

In all wars there are casualties, and some VA employees do receive injuries. In the event that an employee applies for restoration but is no longer physically able to perform all of the duties of the position, we are committed to restoring that employee to the best available position for which he or she is qualified.

VA supports employee participation in the Armed Forces Reserves and National Guard units and lives up to the requirements of chapter 43 of title 38 of the United States Code. I encourage all employers, both private and public sector, to permit their employees to continue to serve their Country through service in the Armed Forces Reserves or the National Guard.

Mr. Chairman, this concludes my testimony. I will be pleased to respond to any questions you or the members of the Committee may have.

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June 23, 1991

Honorable Alan Cranston, Chairman
Senate Committee on Veterans' Affairs
414 Senate Russell Building
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your courteous and attentive consideration of my testimony to your Committee on May 23, 1991, on veterans' reemployment legislation. I write to summarize my oral statement, so that the Justice Department, whose representative was not present, can respond to it. The Department's written statement expressed concern about the constitutionality, or at least the wisdom, of section 4333(e). It would allow the Office of Special Counsel (OSC) to represent federal employees in federal court litigation against their employing agencies.

As I testified, this provision presents no serious constitutional question. True, the bill would place performance of what is surely an executive function, the conduct of litigation, in an officer who is independent of plenary presidential supervision. I believe, as I am sure the Department does, that any such provision presents at least a potential constitutional problem, and that Congress should be sparing in its use of independent officers. For the reasons that follow, however, I believe that use of the OSC for this particular function is fully justified.

After *Morrison v. Olson* the constitutional test for use of an independent officer is whether it impairs the President's performance of his constitutional functions. The Department's statement expresses three concerns that, although not stated as constitutional objections, do imply them. I believe that *Morrison's* holding and logic amply dispose of all three.

First is the possibility that OSC representation could create a serious conflict of interest for OSC attorneys, because the executive branch would appear on both sides of the suit. I begin with the propositions voiced by several other witnesses at your hearing, that Congress is competent to provide a veteran claiming denial of reemployment rights with government counsel, and that employees of federal agencies should be treated equally with those of state governments or private employers. (There seems no adequate reason to force Congress to employ the expensive and cumbersome alternative of recompensing private counsel for this representation. A federal employee, like others, should have counsel who can gain experience in these cases.)

Under current law, nonfederal employees receive representation by the U.S. Attorney. Surely the Department would not extend that representation to federal employees, because the resulting conflict of interest would be direct. Compared to this alternative, the use of OSC removes, rather than creates, a conflict. It is precisely the function of independence to take the officer involved out of the line of command in the executive. In *Morrison* the Court noted that the use of independent counsel removes the conflicts that self-prosecution produces for the executive. Hence I believe that the bill's provision for OSC representation does more to avert than to cause a separation of powers problem.

What I have said so far also responds to the Department's second concern, that of creating the impression that the executive is taking inconsistent positions in court. Again, the purpose of OSC's organizational structure is to provide both the reality and the appearance of independence from executive control. I note that Mr. Shiffer did not press this point in his colloquy with you.

The third concern is the extension of OSC authority to represent federal employees beyond administrative litigation, where it now exists, into federal court. It is not entirely clear whether this objection is meant to be separate from the first two. It may be an expression of the Department's longstanding (and I believe justified) policy of attempting to concentrate control of federal litigation under the Attorney General. But some exceptions are necessary, such as the independent counsel. My response to the first two points shows why this is another. Also, since these suits are brought at the instance of the disgruntled employee and OSC merely provides a lawyer, the Department's traditional policy control over litigation brought in the name of the United States is not infringed.

I hope that my oral statement and these comments are helpful to the Committee. Of course I will be happy to respond to any further questions you may have.

Sincerely,

Harold H. Bruff
Reddit Professor of Law
The University of Texas

Statement of

The American Legion

1608 K STREET, N. W.
WASHINGTON, D. C. 20006

by

JOHN HANSON, DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION

before the

COMMITTEE ON VETERANS AFFAIRS
UNITED STATES SENATE

on

VETERANS EDUCATIONAL ASSISTANCE AND REEMPLOYMENT RIGHTS

MAY 23, 1991

STATEMENT OF JOHN HANSON
DIRECTOR, VETERANS AFFAIRS AND REHABILITATION
THE AMERICAN LEGION
BEFORE THE
U.S. SENATE COMMITTEE ON VETERANS AFFAIRS
MAY 23, 1991

EDUCATION BENEFITS

Mr. Chairman, we commend you and the committee for the work you have done to provide enhanced education benefits for America's veterans. We certainly support the provisions you call for to ensure and improve the educational benefits for the veterans of the Persian Gulf War. Clearly, the war should in no way interfere with the education goals of the brave men and women who serve us on active duty and in the reserves. So, at the very least, S. 868 contains provisions we think are essential to guaranteeing the minimum of what the nation should do for these veterans.

But, with all due respect, Mr. Chairman, we would like to look at the provision of education benefits in a broader sense.

The Montgomery GI Bill has been in place sine 1985. It has been a very useful and popular program that has been instrumental in attracting high quality recruits to the armed forces. Unfortunately, the program's full potential has been compromised by prevailing arguments in Congress and the administration that the nation cannot afford a more generous -- and realistic -- array of benefits.

The most recent example of this occurred during congressional debate in March of this year, when a proposal to improve those benefits by as much as 67 percent was scaled back to the neighborhood of 20 percent. Even the initial recommendation was modest, when we consider that there had been no adjustment in benefit levels in the six years of the program.

The American Legion is convinced that the nation can afford a more realistic educational assistance package for military veterans, and we believe that our nation's elected leadership should commit itself to that goal.

The Legion believes that substantial changes are in order. We commend those who developed the Montgomery GI Bill, and those who actively supported realistic improvements in the program's benefit levels. Now, it is time to permit the program to reach its potential.

According to the Congressional Research Service, current education entitlements provide about 42 percent of the average cost of attending a state institution. World War II, Korean War and Vietnam veterans each received -- on average -- somewhere between 90 percent and 100 percent of their education and training paid for.

And, what did the country get for what appeared to be a substantial outlay of federal dollars? We got an entire generation of college graduates no one anticipated before World War II. We trained and educated a work force that became the great American middle class. We set a standard the world envied, and the money came back in higher taxes and increased production.

Our proposal makes several steps toward fixing the program before it gets worse.

First, it provides for an increase to $777 per month (for a veteran with no dependents) with mandatory cost of living increases, for education benefits. For veterans serving beginning on August 2, 1990, a new chapter to Title 38 will be established. The requirement to make a contribution is waived. Veterans receive between 36 and 45 months of entitlements, depending upon length of service, as provided in chapter 34. Educational assistance for these veterans will be considered as an incremental cost of Operation Desert Storm.

To the extent possible, this bill provides that the program costs will be paid by the Defense Cooperation Account for Fiscal Years 1992-1995. If that account is not adequate to handle the costs, the funds will be made available to veterans in FY 1992-1995 from funds appropriated to the Secretary of Veterans Affairs for readjustment assistance.

Those people eligible under the new Chapter 44 will not be eligible for benefits under Chapter 30. To be eligible, a veteran would have had to serve 90 days on active duty beginning on August 2, 1990. The last date for benefits has not been selected yet, but that date would be the ending date for eligibility under this plan, as it is for other Desert Shield/Desert Storm benefits. People called to active duty in the reserve or National Guard will have no minimum active duty time requirement, but will be determined to be eligible based on the fact that they were activated.

The assistance allowances provided use $777 as the base monthly rate for a full time program of education pursued by a veteran with no dependents. All other rates will be determined proportionately, as they are in Chapter 34 for Vietnam veterans.

The bill will also make some needed changes in the Montgomery GI Bill.

Benefit levels for educational benefits under Chapter 30 are increased, generally, to those levels established for Persian Gulf Conflict veterans. And those benefits will be provided without requiring any of the required reductions in basic pay. In other words, veterans will no longer be required to make a financial contribution to their education.

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If people have made a contribution to the program under earlier provisions, the bill provides for restitution in the form of non-taxable readjustment assistance of any amounts by which an individual's basic pay was reduced since August 1, 1990. In addition, the bill makes similar restitution of such pay reductions made prior to August 1, 1990, to any veteran who, for good cause shown, cannot take advantage of his or her education assistance entitlements.

Pre-Persian Gulf War veterans who elected not to participate in Chapter 30 will now be deemed to have elected to receive assistance. However, these veterans who did not have their basic entitlement reduced by up to $50 per month until the reductions in educational assistance are equal to that amount by which their pay would have been reduced if they had been subject to the pay reduction prior to August 1, 1990.

Too often, necessary benefits for veterans have been denied more because they seem too expensive, rather than reviewed on the merits of the ideas. We saw earlier this year when the Congress voted to increase education payments by $50. Somehow, it seemed too expensive to provide honestly meaningful help to the men and women who have volunteered to defend us.

For those people who disagree with our proposal because this is not a military of conscripts, we have to ask, "So what.?" There may never have been a better trained military in our history, but we cannot ensure that we will always be so lucky in the future, if we don't offer something of real value in exchange for that service. We wonder about efforts to provide tokens of appreciation for these men and women. What if they had made only a token effort in their efforts against Saddam?

They didn't, though, and we owe them an honest measure of respect and gratitude, such as is reflected in our draft legislation.

VETERANS REEMPLOYMENT RIGHTS

The American Legion supports legislation which strengthens Chapter 43 of Title 38, USC. The performance of Armed Forces Reserve and National Guard units in Operations Desert Shield and Desert Storm have been absolutely superb and it is only appropriate to ensure that their jobs and careers are protected when they return home. At the same time, we must recognize that plans are still in place to reduce the size of the active duty military force significantly in the next five years. This reduction will result in our nation placing increased reliance on the National Guard and Armed Forces Reserves in the future. It is therefore particularly appropriate that the amendments proposed\posed in the Veterans Reemployment Rights statute are offered at this time. If service in the Reserves or National Guard becomes a burden for our citizens, they will not serve and the active duty force must be used to take up the slack if national security is to be maintained.

In general, The American Legion concurs in all of the amendments contained in the S 1095. We are particularly pleased to see that the Federal and State Governments as well as the Government of the District of Columbia are included. We are also pleased the appropriate sanctions against discrimination are part of the bill. We are aware of at least one case where and individual was not hired for a job because of membership in the National Guard. Practices such as this are intolerable and must be prevented.

We note that S 1095 contains comprehensive protection against discrimination against any veterans who may be disabled as a result of their service. It is appropriate that the anti-discrimination provisions refer to the Americans With Disabilities Act when defining terms such as "reasonable accommodations" and "undue hardship." We congratulate the Senate for this addition.

We are also pleased with the enforcement provisions. There is one additional provision we would like to see inserted, however. One of the fundamental rights of being a citizen in this country is the right to the collective judgement of one's peers on the rightness or wrongness of an action. In this case, the penalties are not criminal but civil and while that is appropriate, we believe that cases brought to the courts under the new provisions of Chapter 43 should be heard by a jury rather than a judge, provided either the plaintiff or the defendant so desires. Such a provision would protect the rights of both the military reservist or National Guard member, and the employer. We commend this suggestion to your attention.

With respect to the veteran being able to seek relief in the courts, as this committee is aware, such action typically involvers the retention of legal counsel. We have no quarrel with the use of counsel, but if a veteran retains counsel, and the court ultimately finds in favor of the veteran, it should not be the veteran who pays for the legal representation. The defendant employer should be held responsible for the legal bills of the veteran plaintiff. The legislation proposed by the Senate provides for this. It is a positive addition to the law, in our opinion.

It should be abundantly clear that there is a wellspring of good feeling about the outcome of our actions in the Persian Gulf. There is also a wellspring of good feeling about the troops who have served there. They will return home to the heros' welcome they so richly deserve. But there are active duty troops who never went to the gulf, and not every reservist or National Guard member was called up. This legislation also protects them and rightly so. The individual soldier has little or no influence over where he/she will serve.

The American Legion looks forward to working with you on passage of this important legislation.

SURVEY OF CORPORATE TREATMENT
OF
MEMBERS OF THE NATIONAL GUARD
AND
ARMED FORCES RESERVES

Prepared By:
The National Economic Commission
The American Legion
April 12, 1991

SURVEY OF CORPORATE TREATMENT
OF
MEMBERS OF THE NATIONAL GUARD
AND
ARMED FORCES RESERVES

APRIL 12, 1991

METHODOLOGY

A letter from the National Commander of The American Legion was sent to the chief executive officer of each of the companies named in the FORTUNE magazine list of the nations top one-thousand companies. The same letter was sent to the next one-thousand companies in descending order of total revenue. Attached to the letter was a survey form asking several questions regarding the policies of the company regarding the treatment of members of the National Guard and armed forces Reserves who were called to active duty during Operation Desert Shield/Desert Storm. Copies of the survey letter and the survey form are at Attachments 1 and 2.

Based on envelopes returned, it is assumed that 1,950 survey forms were delivered. A total of 356 completed forms or 18.3% of those assumed delivered were returned. No forms returned after April 5, 1991, were tabulated in order to facilitate the availability of this report. Survey forms were divided by company size and tabulated in order to determine whether company size influenced the treatment of reservists.

RESULTS

It is apparent from Figure 1 that the majority of the corporations responding to the survey are going beyond the requirements of Title 38 USC in attempting to treat their employees who are members of the armed forces Reserves and National Guard in a fair manner. More than two thirds of the responses were from companies which continued to allow employees to accrue sick and vacation leave while on active duty. Similarly, more than 61% said they were making up the difference between the salary paid while on active duty with the military and what the employee would have earned at the regular place of employment.

Companies per Benefit By Time Period

CORPORATE BENEFITS	1 MONTH	3 MONTHS	6 MONTHS	1 YEAR	>1 YEAR	TOTAL
Continue Regular Wage/Salary	19	4	5	1	13	42
Make Up Wage/Salary Difference	18	16	28	20	215	297
Continue Health/Life (No Cost to Employee)	8	8	13	4	74	107
Continue Health/Life (Employee Pays Reduced Premium)	0	1	2	2	24	29
Continue Health/Life (Employee Pays Regular Premium)	7	9	10	8	193	227
Continue Accrual of Vacation/Sick Leave	1	3	3	1	239	247
Provide COLA Increases For Active Duty Employees	0	0	0	1	46	47

Figure 1

The survey also shows that major corporations are not the source of most of the reservists and members of the National Guard who were called to active duty. The 356 companies responding to the survey employ at least 3.2 million people yet reported only 9,979 or just over .3% were called to active duty during Desert Shield/Desert Storm. The number of Reserve and National Guard members called to active duty is in excess of 238,000. Thus, 4.2% of those called to active duty as members of the National Guard or Reserve forces came from the large companies who responded to the survey. While a survey of small companies and small business was beyond the scope of this project, one cannot help but wonder whether the majority of those called came from small business, and what the effect on those businesses has been.

Comparison of Benefits By Company Size

CORPORATE BENEFITS	0-1K	1-5K	5-10K	10-15K	15-20K	>20K
	(n=29)	(n=96)	(n=62)	(n=44)	(n=22)	(n=101)
Continue Regular Wage/Salary	6.90%	2%	4.80%	4.60%	0	4.00%
Make Up Wage/Salary Difference	34.50%	62.50%	64.50%	59.90%	81.80%	60.40%
Continue Health/Life (No Cost to Employee)	13.80%	17.70%	20.90%	29.60%	13.60%	23.80%
Continue Health/Life (Employee Pays Reduced Premium)	3.40%	7.30%	8%	6.80%	9.10%	5.90%
Continue Health/Life (Employee Pays Regular Premium)	31.00%	31%	62.90%	54.60%	63.60%	57.40%
Continue Accrual of Vacation/Sick Leave	65.50%	63.50%	68.40%	79.60%	68.20%	65.40%
Provide COLA Increases For Active Duty Employees	20.70%	8.33%	9.60%	27.30%	4.50%	12.90%

Figure 2 (n= number of companies)

In the above chart (Figure 2) it can be readily seen that there is no significant difference between the benefits provided by companies of different sizes. (It should be noted that for companies in the 0-1000 employee range, and the 15-20,000 employee range, the sample sizes are small enough to make suspect any conclusions and/or comparisons with larger sample sizes.)

CONCLUSIONS

Corporate America seems to be doing its part to ensure that members of the Armed Forces Reserves and National Guard are able to maintain a viable lifestyle for their families while they are away. There are undoubtedly some companies which will attempt to exploit the call-up of their employees by cutting their positions and care must be taken to insure that the veterans involved are aware of their rights, and that the companies involved are aware of their responsibilities under the law.

The great unanswered questions concern the members of the Reserve and National Guard who either work for small business or perhaps own a small business. For owners, the Small Business Administration Office of Veterans Affairs has designated a special telephone number to call for information on revitalizing a small business.

RECOMMENDATIONS

The American Legion should pursue several initiatives to ensure that returning service people, especially members of the National Guard and Armed Forces Reserves, are able to return to their jobs when they are ultimately released from active duty. The following recommendations are made with this goal in mind:

1. The Veterans Reemployment Rights statute (Chapt. 43, Title 38, USC) should be updated to make it more enforceable. Most of what is now being enforced is case law developed over a long period of time in the courts. This effort is ongoing and should continue.

2. Funding for the staff of the Veterans Employment and Training Service at the Department of Labor should be maintained at current levels at a bare minimum. The FTEE authorization for FY 1991 and FY 1992 is 288 employees nationwide. While there is some doubt that the staff size is adequate to meet the potential VRR needs, fewer FTEE will surely not be adequate.

3. Monitoring of the Small Business Administration Office of Veterans Affairs should be continued to ensure that the needs of small business owners who were called to active duty are properly served.

4. It is probably inevitable that some people called to active duty will not be able to return to previously held positions. For this reason, the portion of the employment services in the various states dedicated to veterans services must be funded at adequate levels. Ensuring that appropriations are adequate to accomplish this is an ongoing effort of the Economic and Legislative staff.

5. The companies in attachments 3 and 4 of this document must be recognized by The American Legion. These are the companies which met or exceeded the standard of performance set by The American Legion in dealing with employees called to active duty. Recognition should be by letter from the National Commander, through an article in The American Legion Magazine, and by news release in ALNS. Coordination between the Economics Division, the Magazine Division and the Public Relations Division is ongoing to implement this recommendation.

Attachments
1. Letter from National Commander
2. Survey form
3. List of companies meeting American Legion guidelines
4. List of companies exceeding American Legion guidelines
5. Response letters from some companies

The
American
Legion

For God and Country

Thomas Ashley
123 Place Street
Muskegon, MI 49442

Dear Thomas:

If you have been following the news, you know that our country has committed thousands of troops to Operation Desert Storm. You also know that a substantial portion of those troops are members of National Guard and Armed Forces Reserves units activated in communities all over the United States.

Title 38 of the United States Code provides certain rights to members of the Reserves and National Guard when they return to their homes and careers, and we believe that American employers will fully comply with the law. We also know that some companies are going above and beyond the requirements of the law when dealing with employees who have been activated.

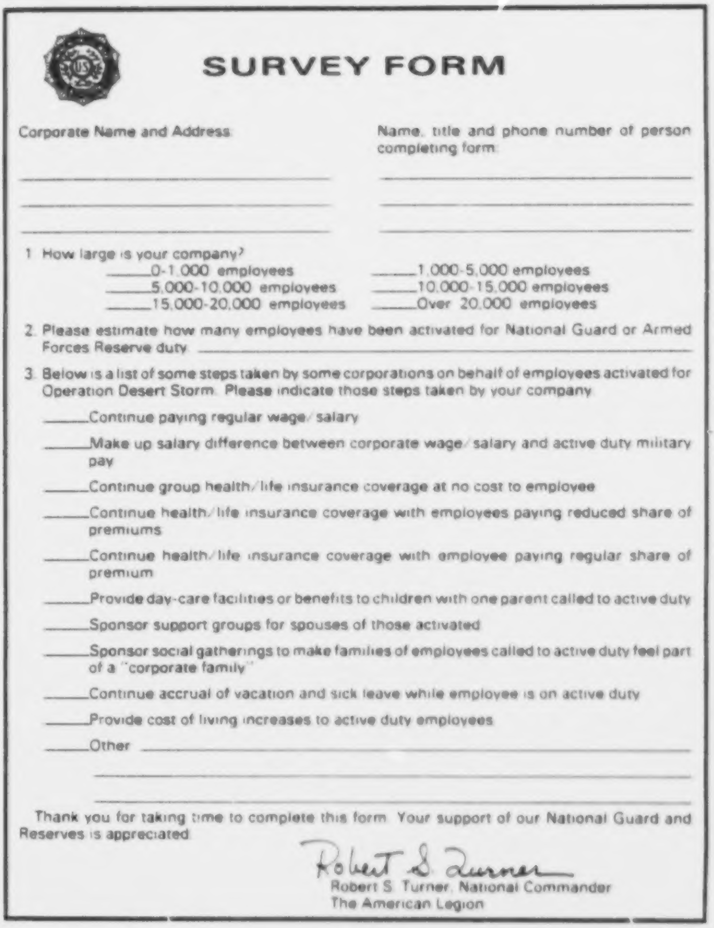
The American Legion considers it appropriate to identify and provide some form of national recognition to these companies for their contribution to the welfare of service members who are also their employees.

Enclosed with this letter is a brief survey of some of the actions taken by employers to ease financial hardships for employees called to active duty. I would very much appreciate your having a responsible official complete this form and return it to our National Headquarters in the postage paid envelope provided.

Thank you in advance for your assistance in this effort and for your contribution to the well-being of your employees who also proudly wear the uniforms of our Armed Forces.

Sincerely,

Robert S. Turner
National Commander



SURVEY FORM

Corporate Name and Address:

______
______
______

Name, title and phone number of person completing form:

______
______
______

1. How large is your company?
   - ______0-1,000 employees
   - ______1,000-5,000 employees
   - ______5,000-10,000 employees
   - ______10,000-15,000 employees
   - ______15,000-20,000 employees
   - ______Over 20,000 employees

2. Please estimate how many employees have been activated for National Guard or Armed Forces Reserve duty: ______

3. Below is a list of some steps taken by some corporations on behalf of employees activated for Operation Desert Storm. Please indicate those steps taken by your company.

______Continue paying regular wage/salary

______Make up salary difference between corporate wage/salary and active duty military pay

______Continue group health/life insurance coverage at no cost to employee

______Continue health/life insurance coverage with employees paying reduced share of premiums

______Continue health/life insurance coverage with employee paying regular share of premium

______Provide day-care facilities or benefits to children with one parent called to active duty

______Sponsor support groups for spouses of those activated

______Sponsor social gatherings to make families of employees called to active duty feel part of a "corporate family"

______Continue accrual of vacation and sick leave while employee is on active duty

______Provide cost of living increases to active duty employees

______Other ______
______
______

Thank you for taking time to complete this form. Your support of our National Guard and Reserves is appreciated.

Robert S. Turner

Robert S. Turner, National Commander
The American Legion

Companies Whose Desert Storm Benefits Match The Legion's

Home Savings of America
Irwindale, CA

Florida Power and Light
Juno Beach, FL

United Services Auto Assoc.
San Antonio, TX

Rohr Industries, Inc.
Chula Vista, CA

Phillips Petroleum Company
Bartlesville, OK

Amoco Corporation
Chicago, IL

United Telecom/US Sprint
Westwood, KS

The Great A&P Tea Company, Inc.
Montvale, NJ

Northwestern Mutual Life Ins. Co.
Milwaukee, WI

Quantum Chemical Corporation
New York, NY

The Torrington Company
Torrington, CT

Rohm and Haas Co.
Philadelphia, PA

Shell Oil Company
Houston, TX

Pacific Telesis Group
San Francisco, CA

E.I. du Pont de Nemours & Co., Inc.
Wilmington, DE

Humana Inc.
Louisville, KY

American Stores Company
Salt Lake City, UT

Sears Roebuck & Co.
Chicago, IL

Firms which grant merit raises instead of cost-of-living increases to their activated reservists/guardsmen are included here.

Companies Whose Benefits Are Superior To The Legion's

The Upjohn Company
Kalamazoo, MI

Matsushita Elec. Corp. of America
Secaucus, NJ

Northeast Utilities
Hartford, CT

New York Telephone/NYNEX
New York, NY

Bethlehem Steel Corporation
Bethlehem, PA

Merck & Co. Inc.
Rahway, NJ

Mercantile Bancorporation Inc.
St. Louis, MO

Degussa Corporation
Ridgefield Park, NJ

Columbia Savings Bank SLA
Fair Lawn, NJ

Beneficial Corporation
Peapack, NJ

The Walt Disney Company
Burbank, CA

Champion Spark Plug Co.
Toledo, OH

Mobil Corporation
Fairfax, VA

The Boeing Company
Seattle, WA

Columbia Gas Transmission Corporation
Charleston, WV

The Turner Corporation
New York, NY

Chrysler Capital Corporation
Stamford, CT

BASF Corporation
Clifton, NJ

Companies

P O Box 029100, Miami, FL 33102-9100

FPL

February 28, 1991

Mr. Robert Turner, National Commander
The American Legion
PO Box 1055
Indianapolis, Indiana 46206-1055

Dear Commander Turner

Your letter addressed to our former Chairman of the Board, John J Hudiburg, has been given to me for a response.

Our new Chairman of the Board is James L. Broadhead. His mailing address is, PO Box 14000 Juno Beach, Florida, 33408.

We, at FPL are very proud of the lead The American Legion has taken in the Operation Desert Shield. Starting with obtaining permission to wear and then furnishing the American Flag to our Troops in the Middle East. We think this current effort to recognize American employers who are going that extra mile, will encourage others to also become involved. Even though it appears that the "War" is over, there is much yet to be done.

Commander Bob, We at FPL have been members of The American Legion Family for years. The Chairman of The Board, when I joined the Company, McGregor Smith, served as the local chairman of the Distinguished Guest Committee for every National Convention held in the Miami Area. (and what a show he would put on.) Many of our employees continue to serve in a number of capacities.

Our company currently has 15,459 employees. Of this number 4842 are veterans. One Hundred-Fifty-three are active reserves and 114 are shown as inactive reserves. Seventeen of our members have been called to active duty and are currently serving. We have the Commanding Office and Chief Administrative Officer of a Medical Unit, with a number of our employees in their unit, that had been alerted, prior to last nights cease fire order. With these numbers, I have tried for years to win Dyke Shannons Employeer of the Year award, but due to our size it has been difficult. This past year, we had an early out program and most of our WW II (The Big War) Veterans retired, so I guess my chances to win Dyke's award is further away then ever.

Thanks again for giving us the opportunity to Brag!

Sincerely,

Billy Anderson,
Employment Manager

PS: Hi Bob Turner. I have sure enjoyed following your year as our Commander. Sorry I missed your last visit to Florida. Hope to see you next time you come south. This past week, I completed my 49th year at FPL, so you see, this must be a good place to work.

an FPL Group company

billy

REC'D MAR 11 1991

IBM [illegible]

Office of the IBM Director, [illegible] and [illegible]

March 6, 1991

Robert S. Turner
National Commander
The American Legion
P.O. Box 1055
Indianapolis, IN 46206-1055

Dear Commander Turner:

Thank you for your recent letter requesting information on IBM employees activated as a result of the current situation in the Middle East. Beyond the information we have listed on the attached form, IBM has also taken other actions in support of our employees, including:

- Extending our military leave provisions from 30 to 365 days.
- Contributing $150,000 to the World USO Organization.
- IBM with Sears and Prodigy Services have established a program called "USA Contact." This permits Prodigy subscribers to send personal "electronic" letters to service personnel in the Gulf at no charge.
- On-going contact with family of active duty reservists, offering support.
- IBM managers of active duty employees provided with a special account to purchase appropriate gifts for service personnel.
- On-going communication of the above with our overall employee population.

Please call me if you have any questions on the information we have provided.

R. W. Hallock

RWH:jmb
Attachment

The Boeing Company
P.O. Box 3707
Seattle WA 98124-2207

February 28, 1991

Mr. Robert S. Turner
National Commander
The American Legion
National Headquarters
P.O. Box 1055
Indianapolis, IN 46206

Dear Mr. Turner:

I am responding to your letter addressed to Mr. Frank Shrontz, President/CEO of The Boeing Company.

Attached you will find the completed survey form which indicates the support we have been providing to Boeing employees who are serving our country at this critical time. Indeed it is our privilege to fully support our employees. We appreciate the concern expressed by The American Legion and wish to reaffirm our support of U.S. troops serving in The Middle East, particularly those who are Boeing employees serving our country.

Sincerely,

R. D. De Lappe
Corporate Director - Personnel
655-3897 1-1860

Attachment

the
VONS.
Companies, Inc.

[illegible]

February 25, 1991

Mr. Robert S. Turner
National Commander
The American Legion
National Headquarters
Post Office Box 1055
Indianapolis, Indiana 46206-1055

Dear Mr. Turner:

I am pleased to respond to the recent letter you sent to Roger Stangeland, Chairman of the Board, of The Vons Companies, Inc.

Our company has taken active steps in protecting the rights and privileges of employees called up to serve our country in Operation Desert Shield and more recently in Operation Desert Storm.

Our company has some 35,000 employees and has made a decision to make up the salary differences between the wages the individuals earned as employees of the company and their active duty pay. We are also sponsoring active support groups and social gatherings for spouses and families of individuals called to active duty. We will be continuing accrual of vacation and sick leave, providing cost of living increases, as well as providing well over $750,000 in direct food contributions to local military bases within our trading area.

We are pleased to be a part of the nationwide support for our troops during these troubled times.

Sincerely,
The Vons Companies, Inc.

Gary B. Duncan

Gary B. Duncan
Director - Employment

/v
Enclosure

The Vons Companies, Inc. • P.O. Box 3338 Los Angeles, CA [illegible]
618 Michillinda Avenue, Arcadia, CA [illegible] • Telephone [illegible]

[illegible] 1991

Mobil Corporation

3225 GALLOWS ROAD
FAIRFAX, VIRGINIA 22037-0001

REX D. ADAMS
VICE PRESIDENT
ADMINISTRATION

March 6, 1991

Mr. Robert S. Turner
National Commander
The American Legion
National Headquarters
P. O. Box 1055
Indianapolis, IN 46206-1055

Dear Mr. Turner:

I am responding to your letter to Allen Murray regarding Mobil's policies and other actions in support of America's troops in the Persian Gulf.

Enclosed is the American Legion's survey form. By way of background, before August 2, 1990, Mobil's policy for reservists called for active duty provided for continuation of salary and benefits for three months. As soon as the war started, we improved our policy to cover active duty for one year, or longer if the war situation had continued.

In addition to policies supporting our own employees, we wanted to show our support on a broader base for America's role in the war effort. First, Mobil established a capital fund of $2 million to help American men and women (or their surviving dependents) of Operation Desert Shield/Desert Storm further their educational goals after completing their service. Twenty universities are participating with us in a scholarship program funded by Mobil grants of $100,000 to each institution. Second, Mobil's contribution of $250,000 was among the first to be received by the American Red Cross following Elizabeth Dole's national appeal to raise $30 million to support humanitarian services to U.S. troops in the Persian Gulf, their families back home, and victims of the conflict there.

Mobil is pleased and proud to support America's Armed Forces and the Red Cross.

Very truly yours,

Rex D. Adams

PLA/mab
Enclosure

BEST COPY AVAILABLE

Friendly's
Great Food
& Ice Cream

March 11, 1991

Robert S. Turner
National Commander
The American Legion
P.O. Box 1055
Indianapolis, Indiana 46206-1055

Dear Mr. Turner:

Enclosed is a completed copy of your survey form wherein we have summarized our efforts in support of those employee-reservists and national guard members who were called up during the Persian Gulf Crisis.

Further, as a result of our proximity to Westover A. F. B., Friendly's has been donating ice cream products to the troops as they have assembled for transport to the Gulf over the past several months and more recently, as they have begun to return home.

We are pleased to do our part to support our employee-reservists and all those military personnel who have passed through Westover A. F. B.

Sincerely,

John J. Goetcheus

John J. Goetcheus,
Personnel Manager

JJG/ec
Enclosure

Friendly Ice Cream Corporation • 1855 Boston Road • Wilbraham, Massachusetts 01095 • (413) 543-2400

NYNEX Corporation
1113 Westchester Avenue White Plains NY 10604 3510

March 1, 1991

Mr. Robert S. Turner
National Commander
The American Legion
P.O. Box 1055
Indianapolis, IN 46206-1055

Dear Mr. Turner,

Responding to your letter to Mr. Donald Reed, Vice President-Human Resourses and Quality, concerning members of the Reserves and National Guard, I am pleased to inform you that NYNEX, stands squarely behind our troops, and employees who have been activated because of the Persian Gulf crisis. Just as our employees see their action as their duty, so does NYNEX see it as its duty to support these men and women when they are called to defend America's interests.

NYNEX will strictly adhere to the federal laws that govern employees' rights as military reservists, and will enthusiastically perform its obligations to make the re-entry process as smooth as possible for our employees whenever they return, no matter what length of time they are away.

Enclosed, please find a listing of projects that NYNEX has acted upon. Please note that the extension of benefits and pay differential for up to one year from the date of call-up will be reviewed if the reservist is required to stay for a longer period of time. The benefits include, but are not limited to: medical; dental; vision care; group life insurance. These benefits also cover the employees' qualified dependents.

If you have any questions, please feel free to call me on (914) 644-6713.

Sincerely,

Staff Manager-Equal Employment Opportunity
Veterans Affairs

NYNEX Support of Operation Desert Shield/Storm

In response to the urgent call by President Bush for the military reserves to participate in the Persian Gulf crisis, NYNEX Corporation enhanced its policy to benefit its employees involved in the call-up. Some of the activities to-date are as follows:

- Extension of benefits and pay differential for up to one year from the date of call-up.
- NYNEX currently has approximately 100 employees participating in Desert Storm.
- NYNEX provided emergency installation of additional service on the first weekend of mobilization (8/24/90) at the 77th US Army Reserve Command Headquarters, among others, including new lines and inside moves.
- NYNEX provided emergency repair to a Commanding General's home telephone service in order to keep him in constant contact with his Headquarters.
- NYNEX provided immediate response to a cable failure at Fort Totten on 8/29/90.
- NYNEX has positioned mobile units at US Army Reserve Centers. This provided additional telephone service for personal calls by recalled reservists at their home station prior to deployment to their mobilization sites.
- NYNEX has provided (8) cellular telephones for use by recalled unit commanders and their Major Subordinate Commander during critical days between mobilization and deployment. These phones are still in use.
- NYNEX Community Team project, "We Care", sent 2,500 Christmas stockings to troops in Operation Desert Shield during the holiday season.
- NYNEX instituted a policy to ensure that no service member recalled to support Operation Desert Shield/Storm would have his/her service interrupted for non payment of a telephone bill.
- NYNEX created a special package containing a Sony Walkman, a special taped message and letter from Mr. Ferguson, and two holiday tapes which were sent to every service member. A twenty

five dollar money order to help defray the cost of telephone calls was also sent to every service member's family. This is an ongoing program and as additional individuals are identified, packages and money orders are sent out. Plans are under development to send a second package to each service member.

NYNEX Benefits department has contacted the families of our reservists to "see how they are doing" and determine if NYNEX can be of any help to them during the Desert Storm effort.

An 800 number (800 228-1524) has been established for family members to call with any benefit questions they may have.

REC'D FEB 28 1991

ZENITH

ZENITH ELECTRONICS CORPORATION ☐ 1000 MILWAUKEE AVENUE ☐ GLENVIEW, ILLINOIS 60025-2493

JOHN I. TAYLOR
DIRECTOR
CORPORATE PUBLIC RELATIONS
AND COMMUNICATIONS
(708) 391-8181
FAX: (708) 391-8234

February 21, 1991

Mr. Robert S. Turner
National Commander
The American Legion
P.O. Box 1055
Indianapolis, IN 46202-1055

Dear Mr. Turner:

Thanks for your survey. Unfortunately, we will be unable to participate.

We appreciate your interest in Zenith anyway.

Cordially,

JIT:cd

Consumer Information Center

Coca-Cola USA
Division of
The Coca-Cola Company

February 27, 1991

Mr. Robert S. Turner
The American Legion
P.O. Box 1055
Indianapolis, IN 46206

Dear Mr. Turner:

Donald Keough asked me to thank you for offering us the opportunity to participate in your survey. We appreciate your interest in The Coca-Cola Company.

As you might imagine, due to our worldwide visibility, executives of The Coca-Cola Company receive numerous requests on virtually a daily basis to take part in similar surveys, questionnaires and research efforts. As much as we would like to be of assistance, time constraints and fully committed schedules make it impossible for us to participate.

We trust you appreciate our position and wish you much success in your efforts.

Sincerely,

Kirk Glaze
Consumer Information Coordinator

KEG:keg

P.O. Drawer 1734
Atlanta, GA 30301
1-800-GET COKE

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

STATEMENT OF

BOB MANHAN, SPECIAL ASSISTANT
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

WITH RESPECT TO

S. 868: PERSIAN GULF VETERANS EDUCATIONAL ASSISTANCE AMENDMENTS,
S. 1095: THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1991, AND
H.R. 153: AMENDMENTS TO THE VETERANS' JUDICIAL REVIEW ACT

WASHINGTON, D.C. MAY 23, 1991

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to appear before this distinguished body this morning to present the views of the Veterans of Foreign Wars of the United States (VFW) with respect to three pieces of legislation. The 2.9 million members of the VFW, to include its Ladies Auxiliary, appreciates the work and effort this committee has expended to ensure that all veterans, their dependents, and widows are treated in an equitable manner.

S. 868: PERSIAN GULF VETERANS EDUCATIONAL ASSISTANCE AMENDMENTS

Section 1 proposes to restore educational assistance to participants in programs for active duty service members, dependents and survivors, and reservists who had received payment of VA-administered educational benefits but were unable to complete their courses as a result of a change in their duties, or of their activation, in connection with the Persian Gulf conflict.This bill would restore the entitlement used for the interrupted course of study. Therefore, upon returning to school, these categories of students would resume their education with the same amount of entitlement that they had before entering the period of schooling but were unable to complete. This proposal would amend chapters 30, 32, and 35 of title 38 USC and chapter 106 of title 10 USC.

Section 2 deals exclusively with Selected Reservists and would amend chapter 106 by extending the delimiting date for reservists' education entitlement by the same length of time they spent on active duty. Also, this bill would ensure that reservists are not considered to have been separated from the Selected Reserve for education benefit purposes because of their active duty service requirement.

The VFW strongly supports bill S. 868 because it is both proper and equitable. We recognize the fact that it is a very complex but necessary piece of legislation. The entire thrust of the bill is to ensure that no one loses an entitlement because of military circumstances and situations that were unforeseen when the original laws were enacted. In fact, PL 102-26 addressed these same issues for Selective Reservists who were borrowers of federal money using the Department of Education's Stafford or Perkins Loans.

S. 1095: "UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1991" is the short title of the second piece of legislation I want to discuss. It was introduced by Chairman Cranston on May 16, 1991. The overall thrust of this bill is to completely rewrite chapter 43 of title 38 USC, which deals exclusively with the employment and reemployment rights of persons who serve in the uniformed services. This law was passed in 1940 and has over the past five decades been amended repeatedly by Congress. It has also been subject to numerous court interpretations over these many years. Today, we have reached the point where the present law has become too difficult and cumbersome to administer.

This bill does have the advantage of making the law easier to understand and to administer. It also more effectively protects the veteran's reemployment rights. Therefore, the VFW favors the bill. A summary of major provisions of this bill are as follows:

- A statement of purpose and definitions of key terms.
- Prohibits discrimination against reservists.
- Provides eligibility for reemployment rights if all periods of service is not more than five years.
- Establishes time period during which an employee must return to work or make application for reemployment based on length of absence.
- Provides employees who are hospitalized or convalescing from a service-connected illness or injury with up to two years beyond the applicable time periods mentioned above to return to work.
- Provides that reemployment rights do not depend on timing, frequency, duration, or nature of service.
- Requires that all persons, including disabled persons, generally must be restored in positions for which they are qualified and which they would have attained had they never left for military service.
- Provides that, at the employee's request, insurance coverage offered by an employer must continue for up to 18 months during the period of military service.
- Provides for retention rights upon reemployment based upon the length of prior employment with employer.
- Provides that an employee may use accrued annual leave during a period of service.

- Provides in the case of a pension benefit plan under ERISA, that a person is treated as not having incurred a break in service with the employer. Furthermore, the person is treated as not having incurred a break in service with the employer and service on active duty is deemed to be service with the employer for pension purposes.
- Provides that a federal government employee may be represented by the Office of Special Counsel before the Merit Systems Protection Board and in judicial review of Board decisions.
- Authorizes the Director of Office of Personnel Management to determine whether reemployment of a person in the Postal Service or Postal Rate Commission is feasible, rather than giving this authority to those agencies.
- Provides that a person would not be required to submit a reemployment rights complaint to the Department of Labor in order to take a claim to the Merit Systems Protection Board or a U.S. District Court.
- Allows federal, state and local employers counsel of choice; and authorize the award to a prevailing employee of attorney's fees and litigation expenses.
- Establishes veterans' reemployment rights information programs for veterans, active duty persons and employers.
- Last, is the requirement to have the Secretary of Labor, the Attorney General and the Special Counsel report to Congress on the implementation of this proposed law after it has been in effect for one year.

Of special interest to the VFW are the following provisions which definitely make this bill a stronger, much more improved reemployment proposal for veterans.

First, all members of the Reserve force and National Guard will retain their job security and advancement, regardless of past or future military service obligations.

Second, the expanded scope of reemployment coverage will include temporary positions, except in cases when the employer's circumstances have changed so as to make it unreasonable or difficult to recreate the temporary position.

The thrust of this proposal is only to ensure that the employee would be restored to the position he/she would have attained by continuous employment without the interruption for military service.

Along this same line, we concur with the expanded principle that disabled veterans seeking to return to jobs with small employers would have the clear right to expect accommodations be made for their disability.

The last significant improvement is the proposal to allow Federal employees to request federal legal representation from Department of Justice's Office of Special Counsel. This representation could be used at the initial appeal before the Merit Systems Protections Board level, and could continue to the appellate level to a Court of Appeals.

At the present time, only employees of State government and the private sector are provided with Federal representation regarding veterans' reemployment rights claims by U.S. attorneys. This is currently done throughout the 94 geographic, Federal district jurisdictions which has led, over time, to an uneven settlement of cases based on where the veteran seeking reemployment lives. In sum, this proposal should go a long way to ensure that the provision of Federal representation is more dependent upon the merits of individual cases.

The two primary VFW concerns deal with the following issues:

- **SECTION 4324**

  With respect to Section 4324, which sets forth the special rules for reemployment by the Federal Government, it appears that proposed language does not extend full reemployment protection to a person whose previous employment was with the Legislative or Judicial Branch, or as a National Guard technician. In contrast, it appears the protection afforded a person whose previous employment was with an Executive agency is far superior, much more meaningful and decisive.

The language indicates that when it is not feasible to restore a person to a Legislative or Judicial branch position and the person is not eligible to acquire a civil service status, that the individual simply loses out on any possibility of transferring to an alternative position. We believe this provision is patently unfair and urge that you strengthen the language to extend full reemployment protection to all federal employees on an equal footing.

o **SECTION 4325**

Under Section 4325, which addresses Seniority, Insurance, and other employment rights and benefits, the provision which forbids health plan carriers from imposing an exclusion or waiting period in connection with resumption of coverage is very important. This provision addresses one of the major problem areas that historically has been a thorn in the side of persons who have served for varying periods in the uniformed services, that of getting their employer sponsored insurance coverage restored quickly and without too much confusion. We believe this provision will go far toward accomplishing that end.

Mr. Chairman, we do have some concern regarding subsection (c)(1) of Section 4325. This provides. That a person whose civilian employment is interrupted due to a call-up, may upon request, have his company-sponsored health insurance coverage continue in force for up to 18 months. Our concern is that this may be a very costly provision for many small business concerns, particularly those with 15 or fewer employees which are least able to afford a health plan in the first place.

We note also that the providing of health care coverage to a person called to duty in the uniformed services has traditionally been borne by his/her branch of service; i.e. the Federal Government. We believe that providing health care coverage for activated members of the uniformed services should continue to be the primary responsibility of the Federal Government when dealing with the Small Business community.

AMENDMENTS TO THE VETERANS' JUDICIAL REVIEW ACT

The letter of invitation requested VFW comments on bill H.R. 153, the "Veterans' Judicial Review Amendments of 1991" which was introduced in the House of Representatives by Mr. Montgomery, for himself and Mr. Stump. This bill passed the House on February 20, 1991. The VFW concurs with all but three of the proposed technical amendments. We propose:

- retaining subsection (b) of section 4067;
- retaining subsections (d)(1) and (2) of section 4067; and
- expanding section 4086.

From a veterans' point of view we strongly recommend that subsection (b) of 4067 retain the words, "The Court shall include in its decision a statement of its conclusions of law." The remaining portion "...and determinations as to factual matters" could be deleted. In our judgment both the claimant and the Department of Veterans Affairs (VA) should be given the professional courtesy of knowing why the appeal was denied. This is also necessary from a claimant's position so that he can perfect an appeal to the next higher judicial authority. We believe the VA can also benefit from the same statement in order to reevaluate their own decision-making process throughout the Regional Office system and their centralized Board of Veterans Appeals.

Again, from a veteran's point of view we ask that subsections (d)(1) and (2) of section 4067 be retained. The present language allows a claimant who has had his case decided by a single judge the opportunity to request a review within 30 days of decision by an expanded panel of the court. In essence, we favor the option of continuing with both the single judge and the panel of judges to review and decide cases. This has the distinct advantage of, in fact, allowing a veteran to receive a reconsideration of an unfavorable decision within the Court of Veterans Appeals (COVA).

Regarding the added new section 4086 "Judicial Conference of the Court of Veterans Appeals," the VFW suggests that the language in line 15 be expanded to include officials of the National Veterans Organizations as well as those veteran representatives already admitted to practice before the Court. This proposal has the distinct advantage of keeping the veteran community, particularly that element of the community that counsels, advises, and presents veterans' appeals before COVA to be kept better informed on a professional basis regarding changing standards or parameters. We believe that the above mentioned officials and representatives of these veterans service organizations can certainly play a meaningful role by shaping and discussing means of improving the administration within the court's jurisdiction.

Mr. Chairman, this concludes the VFW statement. I am prepared to answer any questions you or any committee member may have. Thank you.

STATEMENT OF
LENNOX E. GILMER
ASSOCIATE NATIONAL EMPLOYMENT DIRECTOR
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS AFFAIRS
UNITED STATES SENATE
MAY 23, 1991

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the more than 1.4 million members of the Disabled American Veterans and its Ladies' Auxiliary, I am pleased to appear before you today to present our views on Chapter 43, Title 38, United States Code, relative to Veterans' Reemployment Rights (VRR) and the Veterans' Judiciary Review Amendments Act of 1991.

Mr. Chairman, we want to thank you and the other members of this Committee for your continuing concern over the employment rights of our nation's veterans.

Approximately three years ago, former Assistant Secretary of Labor for Veterans' Employment and Training (ASVET) Don Shasteen announced his office was working on a comprehensive rewrite of the veterans' reemployment rights statute. The current Assistant Secretary Tom Collins stated he was continuing that effort. However, it wasn't until the eve of the hearing held by the House Veterans Affairs Committee on March 7, 1991, that the executive branch submitted its draft legislation.

In the past 15 years, no Administration, to our knowledge, has proposed any meaningful legislation to address the employment concerns and needs of our nation's veterans until now. Instead, with minor exceptions, every Administration since

President Nixon has actually opposed employment initiatives for our nation's veterans.

Mr. Chairman, before I address the issue of reemployment rights, permit me to offer an observation that may be more appropriate for a later oversight hearing. As we are all aware, a cease-fire has been declared in the Persian Gulf. Assistant Secretary Collins' office is providing public information and assistance to reservists and employers on the reemployment rights program. This is good. However, they apparently have taken no action to review the needs of the thousands of troops who will return from the Persian Gulf without reemployment rights and who will be in need of employment services. Because of our concern, we sent Mr. Collins a letter on March 1, 1991, asking for a detailed plan of action to address the employment needs of these soon to be released veterans. A copy of that letter is attached.

The attached April 15, 1991 response from the Assistant Secretary for Veterans' Employment and Training did not address the continuing decline of the Employment Security staff, including Local Veterans' Employment Representatives. Also, this letter did not acknowledge the Administration's proposed decimation of the Disabled Veterans' Outreach Program (DVOP). All of this is going on at the same time Employment Service personnel are being taken out of their offices to support the much needed Transition Assistance Program (TAP) for separating military personnel. In fact, the Administration's 1992 budget request proposes reducing by over 75 percent the DVOP program staffing levels established by statutory formula from 1,885 staff to 438 staff beginning January, 1992. The DVOP personnel are the primary source of staff for the recently initiated TAP program.

An additional concern, Mr. Chairman, is that many reservists and National Guardsmen called up to serve in the

Persian Gulf will not be entitled to be served as veterans through the nationwide network of job service offices because they do not meet the required period of service. We believe these individuals should be accorded veteran status for benefits provided through Chapter 41 of Title 38, USC.

Accordingly, we request you amend Section 2011(4) of Title 38, USC, by adding a new subsection (C) as follows: "(C) Reservists or National Guard personnel who perform active duty for other than training purposes, during a war or in a campaign or expedition for which a campaign badge is authorized, and serve continuously for 24 months, or the full period for which they are called or ordered to active duty."

Reservists and National Guardsmen awarded the Southwest Asia Service Medal are currently entitled to veterans' preference in federal employment and we would urge they also be entitled to priority employment services.

We also suggest you amend Section 2010A, Title 38, USC. That Section currently provides for "studies of unemployment among special disabled veterans and among veterans who served in the Vietnam theater of operations during the Vietnam era ...." We suggest a new subparagraph (c) be added as follows: "On an annual basis, a study will be conducted of unemployment among special disabled veterans and veterans who served in the Persian Gulf theater of operations."

Historically, military personnel, including reservists and guardsmen with reemployment rights, have had little difficulty in exercising those rights. Currently, employers have been very receptive and responsive to their obligations according to most news accounts.

Reportedly, many employers have gone beyond statutory requirements to assure their valued employees who have made the commitment to serve our country are cared for. This includes actions by Constance Newman, Director of the Office of Personnel Management. Some of those actions follow:

- OPM issued a reminder to federal agencies that certain reservists are eligible for veterans' preference.

- OPM issued a Federal Personnel Manual letter reminding departments and agencies of health benefits continuation for reservists on active duty.

- OPM issued a memorandum that in the event budgetary requirements necessitated the furloughs of civilian employees encouraging " ... each federal agency to make exceptions from furloughs for any civilian employee who performs active military duty during the crisis in the Middle East."

- OPM issued a memorandum reminding agencies of the following:

  (1) Retain employees who perform active military duty on the agency's employment rolls in the same position held before their departure.

  (2) Pay the employee's share of health benefits premiums while in a leave without pay status during this crisis.

  (3) Use Employee Assistance Programs (EAP) to provide counseling and referral services for affected employees and family members.

- One law firm in New York prepared a memorandum directed to employers outlining their obligations to activated reservists in the work force.

- Other private employers took additional steps such as:
  1. Providing company newsletters to activated reservists.
  2. Extending health and life insurance.
  3. Inviting dependents to join wellness and recreation programs.
  4. Written and verbal communications to dependents to make sure they understand insurance options.
  5. Extend pay and benefits 90 days beyond that required.

Mr. Chairman, based on the aforementioned, we believe that most employers want to do what is right and what is required by law. Some employers, as indicated, have already gone beyond that required by law. Accordingly, we believe that employers will generally adhere to the law. We do, however, anticipate there will be many inquiries from reservists and others, including employers asking what their rights and obligations are. In that regard, we commend Mr. Collins and his staff for preparing public service announcements, starting a phone hot line and developing other information in response to that need. However, we remain critical of the Administration's lack of support for programs which will provide services to those who need help beyond reemployment rights.

I would now like to discuss S. 1095, "The Uniformed Services Employment and Reemployment Rights Act of 1991," proposing to completely rewrite Chapter 43 of Title 38, USC.

At the outset, Mr. Chairman, you should be aware that the provisions and intent of S. 1095 are generally supported by the

DAV and our testimony contains certain recommendations that, in our view, serve to further strengthen the proposed intent of the bill. Mr. Chairman, the proposed Section 4301, Title 38, USC, among other things, states "It is the sense of Congress that the Federal Government should be a model employer in carrying out the reemployment practices provided for in this Chapter." We fully support that statement and urge its retention in the final bill.

We also support and urge the retention of the provision that includes, under the definition of "employer," "any successor in interest to a person, institution, organization, or other entity ...."

We are pleased to see the inclusion of the Postal Service, Postal Rate Commission and nonappropriated fund instrumentalities as employers.

We also appreciate the many references to the Americans with Disabilities Act of 1990 (ADA) -- P.L. 101-336 -- as we believe disabled veterans will avail themselves of the many protections flowing from the ADA.

Reference is made to the terms "reasonable accommodation" and "undue hardship" and refers to the definitions contained in the ADA. We believe this is very beneficial for those employers who must comply with the ADA and who should not have to meet different standards for accommodating the disabilities of disabled veterans.

Mr. Chairman, this measure, Section 4321, would provide protection against discrimination to "a person who performs, has performed, applies to perform ... in a uniform service ...." It is not clear to us if "applies to perform" means an application to enter the reserves or is currently in the reserves and applies to go on active duty. We urge clarification of the intent of this language so as to avoid confusion at some later date.

Section 4322(c) provides exceptions to the requirement of not more than five years of service to be eligible for reemployment rights. We urge an amendment to subparagraph (2) as follows: after the word "person," add "including a disability, injury or disease incurred while serving on active duty."

Mr. Chairman, Section 4322(d)(2) provides additional time for certain disabled veterans to report back to that person's employer. This is very important and has the full support of the DAV.

In addition, the following process should be incorporated into the intent of the bill. In the case of the most severely disabled veterans, we believe the veteran must notify the employer within a reasonable time frame that he or she is interested in returning to work. This puts the employer on notice that upon completion of hospitalization, convalescence and/or retraining, the employer will have to provide the original job or a comparable one.

The Department of Labor should continue to be responsible for any investigatory/enforcement function. A process could be established through a Memorandum of Understanding (MOU) between the VA and DOL regarding the responsibility of assisting the veteran in notifying the employer.

The Vocational Rehabilitation Specialist (VRS) or Counseling Psychologist (CP) with VA's Vocational Rehabilitation Service should be assigned the responsibility of case manager and be an intricate component of the rehabilitation plan. At the earliest possible date, the VA and a representative of the employer should meet with the veteran to determine:

(1) That the job is still available.

(2) That the veteran can return to his or her previous job with or without job modifications or accommodations.

(3) If the veteran will need any retraining or special equipment to facilitate a return to the job.

(4) If it is otherwise medically unfeasible or if another job of comparable status is offered, what, if any, accommodations, equipment or training will be needed.

As soon as those questions are answered, the Vocational Rehabilitation staff should develop a comprehensive Individual Employment Assistance Plan (IEAP) and initiate any necessary retraining at the earliest possible date.

During these discussions, a determination should be made, as quickly as possible, as to when the veteran may return to work. We believe that by making the employer an integral part of the rehabilitation plan and process, the adverse impact on the employer can be minimized. We believe this is necessary to assure that those veterans who receive the most severe disabilities while serving on active duty can return to a fruitful, productive career.

In the event the disabled veteran makes a decision not to return to the former employer, the employer should be so notified at a reasonable time and the Disabled Veterans' Outreach Program (DVOP) Specialist should be made part of the overall planning process and development of an IEAP. We believe this approach is totally consistent with existing law, including the responsibilities of DVOP Specialists under Section 2003(A), Title 38, USC.

Section 4323 appears to allow an employer to make a determination about the qualifications of an individual to be reemployed. Section (a)(1)(B) states in part, "if not qualified to perform the duties of a position ...." This apparently allows the employer to make that determination. We believe clarification is needed to guard against any employer abuse and suggest report language be included to emphasize that the DOL retain authority to determine qualification for reemployment.

Mr. Chairman, we support Section 4324, which establishes "special rules for reemployment by the federal government." We believe strongly that all veterans should be entitled to similar reemployment rights whether they be federal, state or local government or private sector employees. To do otherwise would constitute a different benefit for the same service. However, a clarification or amendment should provide that the veteran is a federal employee and due all rights and benefits including pay while the federal agency and OPM are making a determination regarding feasibility or placement in a comparable job.

We are extremely appreciative and supportive of your provision that would give federal employees the right to appeal Merit Systems Protection Board (MSPB) decisions denying reemployment in the federal government. We believe very strongly that veterans who are employed with the federal government prior to entry on active duty, should enjoy similar rights and benefits provided to those who are employed in the private sector.

We have long had a concern about the difference in legal assistance provided former federal employees seeking reemployment rights compared to private sector employees seeking the same benefit.

In the case of an employee in the private sector who has a complaint, the individual receives assistance and representation, including court action initiated by the Department of Justice on his or her behalf. By contrast, a former federal employee trying to exercise reemployment rights, will be told to file with MSPB.

Under the current system, private sector employees seeking redress have full representation throughout the court system if it is determined by the Department of Labor and the Department of Justice that court action is warranted. We strongly believe that federal employees should be granted no fewer rights than private sector employees.

As an aside to that issue, I would like to point out that OPM officials have been very responsive to the issue of assuring returning Persian Gulf veterans their reemployment rights as intended by law. At a meeting of the Secretary's Committee on Veterans' Employment (SCOVE) at the Department of Labor, Deputy Director of OPM, Bill Phillips, indicated that he and Director Newman would be willing to take any case where a federal agency declined to comply with the law, if necessary, "to the Oval Office." Mrs. Newman and Mr. Phillips have been unwaivering in their support for providing everything possible to those federal employees who have been called up to active duty during the Persian Gulf crisis. We are very appreciative of that and would be remiss if we did not acknowledge their extraordinary efforts.

Mr. Chairman, absent from your bill is any reference to civil penalties. We testified on March 7, 1991, before the Subcommittee on Education, Training and Employment of the House Veterans Affairs Committee in support of the provision that would provide a " ... civil penalty of not more than $25,000 for each such failure or refusal ..." to reemploy an eligible veteran. There may be recalcitrant employers who would be more amenable to compliance with the law if they knew they were faced with not only back pay expenses, but also a substantial civil penalty.

H.R. 153

Mr. Chairman, the measure H.R. 153, the Veterans Judiciary Review Amendments Act of 1991, was approved earlier this year by the full House of Representatives and referred to the Senate. The bill is virtually identical to legislation that was introduced last year in the 101st Congress at the request of Court of Veterans Appeals (COVA) Chief Judge Frank Nebeker.

The DAV has no objection to favorable consideration of H.R. 153 by the Committee, however, we do have one suggested language change as follows:

Section 3 of the bill would extend COVA the annual authority to establish a "Judicial Conference" composed of COVA judges themselves, with the active participation of "... persons admitted to practice before the Court and ... other persons active in the legal profession."

Mr. Chairman, we recommend the addition of the phrase "and Veterans Affairs claims representation" after the word "profession" in Section 3 of the bill.

Such a language change would ensure that nonattorney representatives, who do provide significant representation before COVA's bar, would indeed have an active role in the Judicial Conference. We note for the record, Mr. Chairman, that Chief Judge Nebeker has stated that he envisions the proposed Judicial Conference "... would focus on the specialty of veterans law and would take into particular account the needs of a large number of nonattorney representatives who practice before our Court ...." (June 13, 1990 letter from Judge Nebeker to House Speaker Foley EMPHASIS ADDED.)

Mr. Chairman, our suggested language modification would indeed give real meaning to Judge Nebeker's stated desire that the proposed Judicial Conference serve the needs of nonattorney representatives. We urge the Committee to amend H.R. 153 accordingly.

Mr. Chairman, I would like to again thank you for the opportunity to appear before you today and I would be happy to answer any questions.

DAV

Motto: "If I cannot speak good of my comrade, I will not speak ill of him."

DISABLED AMERICAN VETERANS

NATIONAL SERVICE and LEGISLATIVE HEADQUARTERS
807 MAINE AVENUE, S.W.
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(202) 554-3501

March 1, 1991

Mr. Thomas E. Collins III
Assistant Secretary for
  Veterans' Employment and Training
U.S. Department of Labor
Room S1313
200 Constitution Avenue, NW
Washington, DC 20210

Dear Mr. Collins:

I recently received a copy of "The Labor Exchange" dated February, 1991. One of the headline articles is "VETS braces for war's end." In this brief article, Executive Assistant Leslie Elliott indicates "... her office is preparing a public service announcement and printed information to inform employers and returning reservists of their re-entry employment rights."

We are appreciative of your office's efforts to provide meaningful information and services to those with reemployment rights. However, we are concerned that nothing is being done to prepare for the onslaught of troops serving in the Persian Gulf or in other parts of the world providing support who will need employment services.

It has been estimated that as many as 200,000 troops returning from the Gulf will be discharged after the war is over. Our concern is compounded when you look at the profile of those serving in the Gulf. Information indicates that the average age of those serving is 27. However, the average age in the infantry is 20. Reservists make up approximately one-third of the troops while nonreservists make up two-thirds. It is the two-thirds of those in the infantry ranks we are most concerned about. Many of them may come home disabled and will need training or retraining and, perhaps most appropriate, services through the VA's Vocational Rehabilitation Program. Those not disabled are going to need not only transition services as may be provided through the Transition Assistance Program (TAP) but also one-on-one employment assistance and referrals through the existing network of LVERs and DVOPs. TAP is not designed to do that.

There is good reason to believe that you will not be able to adequately serve these newest veterans. In the 12-month period ending June 30, 1990, more than one million veterans seeking employment assistance received no reportable service.

We would appreciate it if you would provide us a detailed outline of the steps being planned by your office to assure not only reservists receive timely and adequate information and assistance, but also those who do not have reserve status, the bulk of whom fall in the latter category.

We very much appreciate your interest in this matter and look forward to your response.

Sincerely,

Ronald W. Drach
RONALD W. DRACH
National Employment Director

RWD:dlw

U.S. Department of Labor

Assistant Secretary for
Veterans' Employment and Training
Washington, D.C. 20210

APR 15 1991

Mr. Ronald W. Drach
National Employment Director
Disabled American Veterans
807 Maine Avenue, S.W.
Washington D.C. 20024

Dear ~~Mr. Drach~~ Ron:

This is in response to the concerns expressed in your letter dated March 1 regarding our plans for serving the veterans returning from Operation Desert Storm, particularly those who return with disabilities. You, of course, realize that the care given to our Nation's veterans is of mutual concern. In reality, we share similar, if not the same, views in this area.

The public information campaign that we have launched is not geared exclusively to reservists and National Guard members, but to veterans, reservists and National Guard members. This campaign did indeed start off with the production of fact sheets for returning reservists and National Guard members in reaction to the ambiguity in the applicable statute as to the number of days by which they must report back to work. Once that was clarified, efforts concentrated on all Desert Storm participants, regardless of their geographical assignment. As you know the VETS information hotline at 800-4422-VET is available for ALL returning troops.

We are mindful that the wave of veterans being released after Desert Storm may be followed by annual creats of veterans released as part of the downsizing of the military. We also know that those staff positions funded under the Disabled Veterans' Outreach Program (DVOP)/Local Veterans' Employment Representatives (LVER) were not designed to stand alone or supplant the priority services available by all staff of the public employment and training system. For these reasons, we rely upon our Federal-State partnership and will draw support from the resources of all Job Service staff to provide direct labor exchange services to returning Desert Storm veterans, whether or not they served in the Persian Gulf area.

Our plans include massive numbers of briefings to all separating veterans, reservists and National Guard members at demobilization points, separation centers, and Transition Assistance Program centers on their rights under the Veterans' Reemployment Rights Act, as revised by Public Law 102-12, as well as briefings for employer organizations as to their obligations under the statute.

BEST COPY AVAILABLE

At these briefings, those veterans not covered under the Act or with no employment to which to return learn of the assistance available to them by both the Job Service staff and the individuals funded by our grants.

In your letter you raised doubts as to the ability of these State staff to provide positive results based upon your analysis of Program Year 1990 data. By looking at the reports filed by the Employment and Training Administration for the period which ended June 30, 1990, I see how the over one million veterans not counted in the "received some service" item, were assumed by you to have received no service. A closer look at the data, with the cell definitions in mind indicates that of the 2,374,565 veterans registered during that twelve-month period, 577,512 were placed or obtained employment, 20,223 were placed in training and 1,307,313 received some other reportable service; individuals placed in jobs or training, or who obtained employment, are not included in the "some reportable service" category. One can then conclude that 369,517 individuals who were registered as veterans did not receive services beyond application. This is not a large number nationally, given the number of veterans who apply for unemployment compensation and must be registered, but who actually will return to union jobs or seasonal employment, and do not accept the offer of service every year.

We agree, however, that the assurance of adequate employment and training service delivery relies heavily on a concerted effort by dedicated staff with the full support of related agencies. We now enjoy a very good working relationship with several agencies within the Department of Labor and have effective Memoranda of Understanding signed by key officials within the Departments of Veterans Affairs and Defense, and the Office of Personnel Management. I am confident that with the support of the major veterans' organizations this team can rise to the challenges that lie ahead.

I hope you share my confidence and I thank you for your interest and input on behalf of our Nation's veterans, and your continued support.

Sincerely,

Tom

THOMAS E. COLLINS

SERVING
WITH
PRIDE

AMVETS

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STATEMENT OF

JONATHAN GAFFNEY
AMVETS NATIONAL LEGISLATIVE DIRECTOR

Before the

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES SENATE

On

VETERANS REEMPLOYMENT RIGHTS AND EDUCATION ASSISTANCE BENEFITS FOR ACTIVE DUTY AND RESERVE MILITARY MEMBERS WHO PARTICIPATED IN OPERATIONS "DESERT SHIELD" AND "DESERT STORM"

MAY 23, 1991

Mr. Chairman, AMVETS is grateful to you and Members of the Senate Committee on Veterans Affairs for giving our organization the opportunity to provide our insights into two distinct areas this morning: (1) Proposed legislation which would restore educational assistance entitlements to those members of the military -- both active and reserve -- who could not complete educational courses or programs utilizing these programs due to activation or transfer in support of Operations "Desert Shield" and "Desert Storm," and (2) Legislation which would update Chapter 43 of Title 38, United States Code, Veterans Reemployment Rights.

With regards to the provision of educational entitlements, AMVETS sees no reason why legislation which would reinstate educational assistance entitlements to Operation "Desert Storm" and "Desert Shield" participants in the programs under Chapters 30, 32, and 35 of Title 10 of the United States Code and Chapter 106 of Title 10 should not be passed.

As Senator Cranston mentioned in his remarks accompanying S.868, Section 1 would do little more than restore educational assistance entitlements for active duty service members, dependents and survivors, and reservists who had received payment of VA-administered educational benefits but were unable to complete their courses as a result of the change in their duties, or of their activation, in connection with the Persian Gulf conflict. Section 2 of S. 868 would likewise extend the delimiting date for utilization of VA-administered educational benefits by such a period that equals the length of activation or mobilization.

AMVETS feels that neither one of these requests is excessive in either their cost or scope. It is our understanding that the financial costs involved with passage of this legislation would be $10 million in 1995 and $40 million in 1996. The administrative burden of adjusting such benefits -- while not even known by the V.A. -- would not be excessive.

As an individual who benefitted greatly from VA-administered educational benefits in the late 1980s -- while concurrently serving as an officer in the Naval Reserves -- I couldn't fathom having my hard-earned educational benefits penalized in the event of recall. Furthermore, as a recently de-mobilized Medical Service Corps Officer, I know first-hand numerous young men and women who were recalled in support of Operations "Desert Storm" and "Desert Shield." Individuals who -- due to reasons ranging from transfer to the Kuwait Theatre of Operations, transfers to Naval Hospitals in other parts of the United States, or simply rotating 12-hour shifts out at Bethesda -- had to withdraw from higher-education programs in which they were enrolled. For many of them, the recall period (which for some still exists), started at the beginning -- or during -- the Fall 1990 Semester and continued through the now-ending Spring 1991 Semester. I read recently that it is the Department of Defense's intent to have the majority of Guard and Reservists home and demobilized by July -- almost a year after some of them were called up. In light of these aspects, this education re-instatement package is not a lot to ask and certainly will send the right message to current members of the military as well as those considering joining.

The Veterans Reemployment Rights agenda of this hearing is an extremely important issue to AMVETS membership, and we are pleased that the Committee saw fit to finally address some of the more dated provisions of this law. As you know, AMVETS last year opened up membership in our ranks to members of the guard and reserve.

After careful review of the proposed changes to Chapter 43, Title 38, -- including review of H.R. 1578 -- AMVETS is pleased with some of the proposed revisions that have been made. First of all, we appreciate the clear delineation of the types of discrimination prohibited by the legislation as defined in Section 4321, particularly the inclusion of such employment areas as promotion, retention, or reemployment. Second, the extension of the reemployment rights from a period of four years to five years as well as the standardization of the "return period" for a service member to an employer will help to not only make it easier for an individual to serve in the military, but will make the laws governing that service clearer and easier to understand. Third, we strongly endorse the inclusion of the provisions which grant a two-year interval for return to an employer of a service member who was hospitalized due to a service-connected illness or injury. The current law is clearly and blatantly unreasonable.

Finally, AMVETS supports the language in this legislation which provides that entitlement to reemployment rights does not depend on timing, frequency, duration, or nature of service. AMVETS has long been an opponent of those rare cases of "reasonableness tests" in determining a service member's rights and benefits.

While we have briefly touched upon some of the more pertinent provisions of this legislation (to AMVETS' membership), we want to go on the record again as supporting this entire piece of legislation and the efforts of this Committee and the House Committee on Veterans Affairs to bring this re-write about. We consider it fare, timely, and truly reflective of the "nature of the business" of serving in the United States military in the 1990s.

While not directly related to the intent or provisions of veterans reemployment, AMVETS wishes to bring forth two concerns related to military service and readjustment to civilian society. First, is the area of discrimination as it relates to the application of credit. Although this legislation prohibits an employer from discriminating against an employee -- who also is a service member -- in the areas of initial employment, reemployment, retention in employment, or promotion based on that individuals military affiliation, we are concerned that the same protection does not adequately extend to these same individuals in the granting of credit. The recently-amended version of the Soldiers and Sailors Civil Relief Act of 1940 did not contain adequate provisions to protect members of the Guard and Reserve from discrimination in the application for credit. As we know, the Soldiers and Sailors Act allows for an interest-rate reduction for many types of consumer debt -- including home and auto loans. Since, under current market conditions, this interest rate reduction is significant, it is our concern that any member of the Guard and Reserve who applies for credit may be denied by a lending institution due to the possibility of a rate reduction.

Our second concern is with Chapter 42 of Title 38 of the United States Code, "Employment and Training of Disabled and Vietnam Era Veterans." While we applaud the current legislative initiative to redefine eligibility for job training and assistance from the established 180-day service period to 90 days, we are not convinced that this new service period is adequate in addressing the rightful definition of a veteran in light of the United States' recent involvement in Operations "Desert Storm" and "Desert Shield."

Leading up to this conflict -- particularly in the weeks just prior to commencement of hostilities on January 16, thousands of Guard and Reserve personnel were recalled to active duty and sent to the Persian Gulf theatre. On February 27 -- just 42 days later and after 100 hours of a land battle -- the war was completed. Within a week of cessation of hostilities, military members were returning to the United States and certain reservists were being demobilized. In light of the exceptionally large reserve activation (including members recalled and sent to the Persian Gulf leading up to February 27), the extremely short duration of the war, and the almost instantaneous demobilization upon cessation of hostilities, AMVETS is concerned that a 90-day provision will not encompass all deserving veterans who participated in the war. If this proposal (90 days) is enacted, it is conceivable that a member of the Ready Reserve serving in a combat MOS may qualify for a Combat Infantry Badge or Combat Medic Badge (30 days) but not qualify for professional education and training services.

What we are proposing is language which would tie definition of veteran for employment and counseling programs to the awarding of campaign ribbon or expeditionary medal consistent with service in a combat theatre. We feel that this type of provision will more accurately reflect an individual's contribution to military service during recall granted that the provisions for the awarding of a campaign or expeditionary medal are appropriate.

Again, AMVETS wishes to express our sincere appreciation to the Committee for allowing us to provide our thoughts and concerns to you in these areas. We stand by to provide you with any further information or support.

PVA
PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

STATEMENT OF
CLIFTON E. DUPREE, ASSOCIATE LEGISLATIVE DIRECTOR
PARALYZED VETERANS OF AMERICA
BEFORE THE
SENATE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
S. 868
"PERSIAN GULF VETERANS EDUCATIONAL ASSISTANCE AMENDMENTS"
S. 1095
"UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT
RIGHTS ACT OF 1991"
AND
H.R. 153, "VETERANS' JUDICIAL REVIEW ACT "
AND
S. 1050, "U.S. COURT OF VETERANS APPEALS AMENDMENTS"

MAY 23, 1991

Mr. Chairman and Members of the Committee, it is a pleasure and personal privilege to appear here, today, on behalf of Paralyzed Veterans of America (PVA). Thank you for inviting us to testify

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and present our views regarding certain needed changes and improvements in veterans' education and employment benefits and judicial review issues.

Since 1944, over 20 million men and women have trained under the various education programs administered by VA. It has been estimated that these veterans will pay up to eight times the costs of their education in federal income taxes based on the added lifetime income their education made possible.

Mr. Chairman, PVA encourages you to engage in aggressive oversight of these programs and to continue to consider legislative initiatives such as those you are considering today. By so doing, you will ensure that the Nation's investment in the benefits being made available to our veterans and service personnel will remain strong.

S. 868, ENTITLEMENT TO EDUCATIONAL ASSISTANCE

Mr. Chairman, PVA supports this legislation which is intended to provide educational assistance program enhancements through the cancellation of a portion of the direct student loans to members of the Armed Forces who served in a combat zone in connection with the Persian Gulf conflict. The bill would also require the restoration of educational benefits and tuition reimbursement for those members of the Armed Forces who were unable to pursue studies because of military commitments. In addition, the bill extends the delimiting date for reservists' education entitlement by the length of their periods of active duty, and provides that reservists are not to be considered to have been separated from the Selected Reserve for education benefit purposes by reason of their active-duty service.

This provision proposes to restore educational assistance entitlement to participants in the pursuit of courses which they were unable to complete because either they were reservists who were called to active duty, or, in the case of active-duty servicemembers, they were assigned duties that prevented them from completing their courses.

Mr. Chairman, PVA supports this legislation which would further define VA educational entitlements by making several appropriate amendments to Chapter 30, title 38, United States Code, and Chapter 106, title 10, United States Code. In addition, the bill addresses several features of Chapters 32 and 35 of title 38, United States Code, which would result in the improvement and standardization of several aspects of these programs.

The legislation, as a whole, will assist young men and women in obtaining an education they might not otherwise be able to afford. It also promotes and assists the all volunteer military of the United States by attracting qualified men and women to serve in the active duty Armed Forces and the Select Reserves.

THE SURVIVORS' AND DEPENDENTS' EDUCATIONAL ASSISTANCE PROGRAM AMENDMENTS

Programs authorized by Chapter 35 have great significance for the members of PVA and their families. Through these programs, the dependents and spouses of a severely disabled veteran can pursue an education without depleting the family's savings or without accumulating significant debt.

For the purposes of maintaining continuity and equality in the program, PVA opposes VA's legislative proposal to eliminate eligibility of stepchildren for Chapter 35 Survivors' and Dependents' Educational Assistance.

S. 1095, UNIFORMED SERVICES EMPLOYMENT and REEMPLOYMENT RIGHTS ACT OF 1991

Mr. Chairman, we want to thank you and the other members of this Committee for your continuing concern over the employment rights of our Nation's veterans. The Veterans' Reemployment Rights (VRR) provisions of Federal law, which safeguard employment and reemployment rights in civilian employment of members of the uniformed services, have been in effect for over fifty years.

Although the law has effectively served the interests of veterans, members of the Reserve Components, the Armed Forces and employers, the current statue is complex, at times ambiguous, and, in some instances, does not reflect court interpretations made through the years. Members of the uniformed services and employers have, on occasion, expressed confusion and uncertainty regarding their rights and responsibilities under current Chapter 43, title 38, United States Code.

The reemployment rights program is certainly due for a complete review, providing assessment of the needs and experiences of returning Operation Desert Storm Reservists and National Guard members.

Mr. Chairman, we are very appreciative of the action taken in the legislation to provide employment to those reservists who incur a disability while serving on active duty. We strongly support the provision contained in the bill which would allow a disabled individual up to two years hospitalization and convalescence before exercising his or her reemployment right options.

We do see circumstances when the disability, such as a spinal cord injury, could be so severe as to necessitate extensive training or vocational rehabilitation efforts necessary to return to employment. Under this arrangement the disabled veteran would have an obligation to notify the employer of the intent and ability to resume work. After that, the employer, the disabled veteran and the VA's vocational rehabilitation division, would work together in formulating a rehabilitation plan in a case management concept that would be compatible with the disabled veteran's needs as well as the needs of the employer.

PVA strongly supports your provision of accommodation which certainly should be no less than that provided under current law contained in the "Americans With Disabilities Act of 1990." We also support your provision which clarifies that all persons, including disabled persons, generally must be restored in positions for which they are qualified and which they would have attained had they never left for military service.

PVA supports the continued coverage by an employer-offered health insurance program, at the employee's request. Coverage would not exceed eighteen months after the commencement of such service.

PVA supports the provision which would provide a federal government employee the same representation by the Office of Special Counsel before the Merit Systems Protection Board and in judicial review of Board decisions as those provided persons employed by state and private employers.

H.R. 153, "VETERANS' JUDICIAL REVIEW ACT"

PVA opposes the provisions contained in H.R. 153 which would strike subsection (b) of Title 38, U.S.C., section 4067. That Section provides that "The Court shall include in its decision a statement of its conclusions of law and determinations as to factual matters." This is an important right for veterans and must be preserved in the law.

Quite simply, when a veteran seeks review from the Court, the veteran is entitled to be informed, in language he or she can understand, the findings made by the Court and the reasons for those findings.

While this information is naturally important to the veteran, it is, in the infancy of judicial review, important for advocates of veterans. Veterans' advocates will be severely hampered in their representational efforts if they cannot discern the reasons for past Court decisions. The development of the law by the Court is an important new phase in the law of veterans benefits. If the Court is not required to give reasons and legal bases for its decisions it will be difficult to use its decisions for legal precedent and to predict how the Court would rule in future cases--a matter of extreme importance for organizations representing veterans in administrative and judicial proceedings.

It is also important to note that while the Court, in general terms, acts as an appellate body, it is the first stage of judicial review. The BVA is constrained by statute to follow VA regulations and legal opinions of the VA General Counsel. The Court must pass, for the first time on the legality of both of these. To permit the Court to pass on questions such as this without opinion, would severely hamper the advancement of the law of veterans benefits.

The Court has already rendered a decision under which it issues summary dispositions of certain cases. See Frankel v. Derwinski, U.S. Vet. App. No. 89-167 (Aug. 17, 1990). Attached to our testimony is a decision in Derry v. Derwinkski which was issued under the Frankel criteria. PVA has received complaints from veterans who have received such decisions in their cases. The veterans simply cannot understand what the Court has decided in their case. The Court's decisions are not widely distributed. Consequently the recitation of a case name as a substitute for the legal bases upon which a case is decided does not truly inform the veteran why the Court ruled as it did in the veteran's case. The proposed legislation would permit the Court to do away with even this limited explanation of its decisions. PVA believes our nation's veterans are entitled to more.

The Committee should make no mistake, however, by believing that the repeal of this provision is a mere technical amendment. It will remove a significant right and due process protection currently enjoyed by all veterans applying to the Court for relief. Perhaps the repeal of 38 U.S.C § 4067(b) would be appropriate some years from now when an adequate body of law is built by the Court and when the Court has devised a way to make its decisions available to the general public. It's passage at this time is, in our judgement, premature.

H.R. 153 also proposes a new statutory provision, 38 U.S.C. § 4086, that would authorize a Judicial Conference of the Court of Veterans

Appeals. We oppose this provision as premature.

Despite clear legislative history that Congress intended that non-lawyer practitioners be permitted to practice before the Court, the Court is now wrestling with under what circumstances such individuals should be permitted to practice before the Court. In fact, the Court issued a preliminary rule that would severely restrict the practice of non-attorney practitioners before the Court. Until such time as the issue of who will represent veterans and how representation before the Court will be conducted is finally settled by the Court, the scope or need for any Judicial Conference focused solely on the Court of Veterans Appeals has not yet been demonstrated.

This is especially true because attorneys who practice before the Court already have a voice in the Court's business. Currently the Court participates in the Judicial Conference for the United States Court of Appeals for the Federal Circuit. This gives attorney practitioners sufficient opportunity, at this early stage in the Court's practice, to receive and dispense information regarding improving the administration of justice within the Court's jurisdiction. Attached to our testimony, as well, is a copy of this year's schedule of the Federal Circuit Judicial Conference including the "breakout session" program given by the Court of Veterans Appeals.

PVA has no objections to the modifications of the redesignated § (c) of 38 U.S.C. § 4067, to the repeal of the current § (d) of that statute nor to the proposed modifications of 38 U.S.C. § 4068(b)(2) and 38 U.S.C. § 4054.

S.1050

PVA has no objection to this legislation which would allow the U.S. Court of Veterans Appeals to accept voluntary services, gifts and bequests.

Mr. Chairman, I would like to thank you again on behalf of the members of the Paralyzed Veterans of America for holding this hearing on these most important and timely matters. This concludes my testimony, and I will be happy to answer any questions you may have.

U.S. COURT OF VETERANS APPEALS
FILED
OCT 23 1990
OFFICE OF THE CLERK

Note: Pursuant to 38 U.S.C. § 4067(d)(2)(1988)
this decision will become the decision
of the Court thirty days from the date hereof.

UNITED STATES COURT OF VETERANS APPEALS

No. 90-97

WILLIAM R. DERRY, APPELLANT,

V.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Submitted July 5, 1990 — Decided October 23, 1990)

William R. Derry, *pro se*.

Raoul L. Carroll, General Counsel, *Barry M. Tapp*, Assistant General Counsel, *Andrew J. Mullen*, Deputy Assistant General Counsel, and *R. Randall Campbell* were on the brief for appellee.

MEMORANDUM DECISION

Before FARLEY, *Associate Judge*.

FARLEY, *Associate Judge*: In its decision of January 22, 1990, the Board of Veterans' Appeals concluded that service connection for a seizure disorder and service connection for a sleep disorder were not demonstrated by the evidence presented. The Board denied the veteran's claim and this appeal followed.

Upon consideration of the record and the briefs of the parties, it is the holding of the Court that appellant has not demonstrated that the Board of Veterans' Appeals committed either factual or legal error which would warrant reversal. *See Gilbert v. Derwinski*, U.S. Vet. App. No. 89-53 (Oct. 12, 1990); *see also Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *Danville Plywood Corp. v. United States*, 899 F.2d 3 (Fed. Cir. 1990). Summary disposition is appropriate. *See Frankel v. Derwinski*, U.S. Vet. App. No. 89-167 (Aug. 17, 1990).

Therefore, the decision of the Board of Veterans' Appeals is AFFIRMED.

Copies to:

THE NINTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MAY 9, 1991

PROGRAM

9:00 - 9:15 STATE OF THE COURT

Chief Judge Helen Wilson Nies

9:15 - 9:30 FEDERAL CIRCUIT RULES UPDATE

Hon. Francis X. Gindhart, Clerk

9:30 - 10:50 Upstairs/Downstairs: Panels of Trial and Circuit Judges Candidly Appraise the Judicial Process As Seen from their own Vantage Points

Trial Judges:

Hon. Avern Cohn, Eastern District of Michigan
Hon. Jane A. Restani, Court of International Trade
Hon. Franklin S. Van Antwerpen, Eastern District of Pennsylvania

Moderator: Hon. S. Jay Plager, Federal Circuit

Federal Circuit Judges:

Hon. Daniel M. Friedman
Hon. Pauline Newman
Hon. Paul R. Michel

Moderator: Hon. Rya W. Zobel, District of Massachusetts

10:50 - 11:45 What you Always Wanted to Know about the Selection of Outside Counsel and Were Afraid to Ask: A Panel Discussion of How the Process Works

E. McIntosh Cover, Vice President and General Counsel, Olin Corporation

Edward D. Grayson, Senior Vice President and General Counsel, Wang Laboratories, Inc.

Harry J. Pearce, Vice President and General Counsel, General Motors Corporation

Moderator: Allen L. Cleveland, Former Senior Vice President and General Counsel, Conoco

12:30 - 2:00 LUNCHEON - The Vice President of the United States

2:15 - 4:30 BREAKOUT SESSIONS

THE NINTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

May 9, 1991

COURT OF VETERANS APPEALS BREAKOUT SESSION

2:15 - 2:30 Welcoming Remarks

Chief Judge, Frank Q. Nebeker

2:30 - 3:15 Court Administration and Policies

Hon. Robert F. Comeau, Clerk, Court of Veterans Appeals

3:15 - 3:30 Break

3:30 - 4:15 Update on Veterans Laws

Office of General Counsel
Department of Veterans Affairs

4:15 - 4:30 Organization of Judicial Conference for Veterans Law

Hon. Ronald M. Holdaway, Court of Veterans Appeals

aascu

American Association of State Colleges and Universities
One Dupont Circle/Suite 700/Washington, DC 20036-1192
202/293-7070 202/296-5819 (FAX)
Allan W. Ostar, President
Edward M. Elmendorf, Vice President for
Governmental Relations

Testimony

Given by
Allan W. Ostar, President
American Association of State
Colleges and Universities

to the
Senate Veterans' Affairs Committee
United States Senate

on behalf of:
American Association of State Colleges and Universities

May 23, 1991
Washington, DC

Mr. Chairman, members of the Committee, I am Allan Ostar, President of the American Association of State Colleges and Universities (AASCU). I appreciate this opportunity to present testimony in support of S. 868, a bill to improve educational assistance benefits for members of the Selected Reserve of the Armed Forces who served on active duty during the Persian Gulf War.

AASCU represents over 370 public colleges and universities and 30 state university systems across the nation enrolling more than 2.5 million students. AASCU campus locations range from small rural communities to large urban centers, and our student population is truly representative of our nation's diverse citizenry.

AASCU houses the Servicemembers Opportunity Colleges (SOC), an organization that was created in 1973 by the higher education community with the objective to expand and improve postsecondary educational opportunities for military personnel and veterans.

AASCU has long been an advocate of establishing partnerships between the military and the higher education community. Certainly we support legislation that reinforces these partnerships by guaranteeing that there are no penalties in terms of educational entitlements for those who served in Desert Shield and Desert Storm.

The nation rallied behind our troops during the Persian Gulf conflict, and we must continue to show our support for the men and women that risked their lives in the line of duty now that the conflict has ended. It would be a disgrace if we did not restore all education entitlements that were used for course work that could not be completed because of service in the Persian Gulf War, and extend the delimiting date for reservists' education entitlements by the period of time they served on active duty.

In fact, the education entitlement provided for in Chapters 30, 32, and 35 of Title 38, and Chapter 106 of Title 10, are sparse enough as they now stand. It would be a severe injustice to permit these entitlements to be eroded by precisely the kind of service that was their justification in the first place.

In addition to ensuring that there are no penalties for service when called, we must do more to encourage servicemembers and veterans to use their benefits to get a college education. History suggests that it is in the national interest to do so.

More attention must be paid to making veteran's education entitlements attractive and relevant to the needs of the modern veteran, who is an adult student in a changing educational environment. We need to place more emphasis on vocational education and job training, as well as encouraging the increasing numbers of veterans with undergraduate degrees to use their education benefits towards a graduate degree. Benefits must also be increased. Veterans education benefits have not been adjusted for inflation in six years.

In addition to the proposals set forth in S.868, I suggest that Congress begin a more comprehensive review of veterans' educational entitlements with an eye toward strengthening them and tailoring them for the 1990's. Ideas that should be considered are:

- Create an aggressive, multi-Departmental program to facilitate the educational aspects of transition from military to civilian life. (Current efforts are not yielding the level of participation that the country needs.)

- Consider making Chapter 30 benefits available to Reservists and National Guard members called up for more than 180 days and who served in the combat zone for more than 90 days.

- Establish an active effort to encourage veterans not oriented toward an academic degree program to participate in occupational instruction offered by junior colleges and in apprenticeship / on-the-job training programs.

- Do not permit Montgomery GI Bill benefits to be considered as "income" in the means test for determining student financial aid. Veterans should be rewarded for their service. They should not be penalized because they are receiving entitlement as a result of that service. (Especially since they contributed $1200 to the fund in order to receive benefits.)

- Consider extending the time limits for eligibility to receive education benefits as an adjustment to changing practice in academe.

- Adjust GI Bill benefits for past inflation and consider some kind of indexing for the future.

- Make all the nation's servicemembers, including the Reserves and the National Guard, eligible to pursue graduate programs with the aid of their benefits.

- Promote programs to encourage veterans to use their benefits to help fill critical skills needed in the nation's schools and workplaces. (Servicemembers have skills that, combined with education in the civil sector, can help to address teacher shortages, nursing and allied health needs, etc.)

Mr. Chairman, AASCU supports S. 868, and looks forward to working with you to pass S. 868. But the passage of S. 868 cannot be our ultimate goal. We must build upon S. 868, and make our veteran's education programs more responsive to the needs of today's servicemembers. Providing postsecondary opportunities for the servicemembers and veterans of our armed forces not only benefits those individuals involved but helps to strengthen the economic well-being of the nation.

ASSOCIATION OF THE UNITED STATES ARMY

2425 WILSON BOULEVARD, ARLINGTON, VIRGINIA 22201-3385 (703) 841-4300

STATEMENT BY

COLONEL ERIK G. JOHNSON, JR., USA RET.

DIRECTOR OF LEGISLATIVE AFFAIRS

ASSOCIATION OF THE UNITED STATES ARMY

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES SENATE

FIRST SESSION, 102ND CONGRESS

EDUCATION AND VETERANS REEMPLOYMENT RIGHTS

23 MAY 1991

A Statement to the Senate Committee

on

Veterans' Affairs

United States Senate

23 May 1991

Mr. Chairman and Members of the Committee:

It is a pleasure for me to provide you with the legislative position held by the Association of the United States Army on two bills before you today: "S. 868, a bill to amend title 10, United States Code, and title 38, United States Code, to improve educational assistance benefits for members of the Selected Reserve of the Armed Forces who served on active duty during the Persian Gulf War, and for other purposes", and "S. 1095, a bill to amend title 38, United States Code, to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services."

S. 868

Once again the Senate Committee on Veterans' Affairs has moved swiftly to provide relief for members of the Active and Reserve Components who may be in danger of losing a portion of their educational benefits provided by titles 10 and 38. You are to be commended for your recognition of and solutions for what could become inequities in the rights of our service personnel to pursue their educational assistance entitlements.

It is not clear to our Association how the rights of retirees who were recalled to active duty would have their benefits protected. Since they are not referred to specifically, are they protected in the same manner as active duty personnel and members of the selected reserve? If there is an oversight in this regard, we recommend that retirees recalled to active duty receive the same consideration as any other participant in the education assistance program of the Department of Veterans' Affairs.

Additionally, some course curricula are designed sequentially and must be followed course by course. It may be that a student would have to wait for an entire academic year before enrolling in another course because of having withdrawn from a previous prerequisite in the major course of study. The law must be responsive to a situation such as this and provide additional time beyond what the amendment has intended. Although this would be an unusual circumstance it must be recognized as a potential problem area for our veterans.

S.1095

Operations Desert Shield and Desert Storm provided a massive test of this nation's commitment to reemployment rights of reservists. While the current law has been adequate in solving most of the reemployment problems associated with inactive duty training, annual training and active duty for training, it did not pass the litmus test of understanding during the recent mobilization for the Persian Gulf crisis.

Members of the reserve need a law that they can read and easily understand. We think you are on the correct azimuth with your changes and additions to the current law but still lack some elements of simplicity.

The die has been cast on the use of reserve component forces in contingency operations. Fiscal realities have already caused the Department of Defense to begin moving toward a regular force that will be about twenty percent smaller by 1995. The end strength of the Guard and Reserve may also be reduced proportionately. Future contingencies on the scale of our operations in the Persian Gulf will surely see commitment of reserve forces on a grand scale.

We agree with the provisions of the bill that would extend reemployment rights for one additional year thereby providing job protection for up to five years. This change would seem to be responsive to the most demanding call to active duty and training requirements that could confront our citizen soldiers.

Our Association received many inquiries during Desert Shield/Storm concerning reemployment rights of reservists. The most frequently asked question concerned the time frame in which the reservist must return to work after leaving active duty. You have defined that and put it in language that our men and women can clearly understand. There should be no misunderstanding now between the employer and the employee as to when the reservist is available to resume employment.

Having said that, there is a need to understand the problems of the employer. Should employees who have been on duty for any period of time less than 48 months have a uniform time applied to their tenure in returning to their job? We need to ensure that involuntary removal from a position does not take place before a reasonable amount of time has transpired, but to give the same rights for one week or two-hundred weeks may be beyond reasonableness. Perhaps we should hear more from employers on this subject. The last thing we want to do is to alienate the business community in hiring members of the reserve component.

Accrual of annual leave with pay during periods of service is a worthy benefit for our reservists and we would hope that employers would willingly adhere to the practice. But, could it be an economic issue which may cause employers to overlook reservists in their workforce. The bill's requirement to treat reservists the same as any other employee is the right answer to this problem.

Ancillary to this issue of equal treatment is the bill's requirement regarding notification for use of annual leave. Unfortunately, mobilization does not always provide adequate lead time for written notification or request for leave to the employer. The law should recognize time and circumstance and allow for reasonable reaction by both employer and employee.

Overall, the proposed legislation recognizes the problems of reemployment rights for reservists. Further care should be exercised in crafting the final language of this bill or the amendments thereto.

We have a divided interest in this legislation because we have both employee and employer interests in mind. In the area of litigation the employee's interest is well served by offering special counsel through the appeal process for government employees. It is fair and equitable and treats government employees the same way as those in the private sector.

Our Nation's activation of more than 200,000 reservists for the Persian Gulf war has made the issue of reserve mobilization a clear reminder that the Total Force is just that. A mobilization call could come in the middle of the night with deployment soon after. Today we have an opportunity to craft an easily understood law protecting the employment interests of those called to duty in defense of this Nation.

Once the Veterans' Reemployment Rights Amendments are accepted as additions to the current law we must make sure that veterans are informed of their reemployment rights. At the same time employers should be informed of their responsibilities included under chapter 43 of title 38, United States Code. Your provisions for establishment of such a program will facilitate improvement of veterans' reemployment rights.

The Association of the United States Army is appreciative of the Committee's efforts in behalf of the Guard, Reserve and local business professionals.

Thank you for the opportunity to testify in behalf of this proposed legislation.

EANGUS
1 MASSACHUSETTS AVE NW SUITE 101
WASHINGTON D.C. 20001

STATEMENT OF

MASTER SERGEANT

MICHAEL P. CLINE

EXECUTIVE DIRECTOR

ENLISTED ASSOCIATION OF THE NATIONAL GUARD

OF THE UNITED STATES

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON VETERANS' AFFAIRS

23 MAY 1991

Mr. Chairman and distinguished Senators of the Committee:

I am very pleased to have been asked to present testimony to the Senate Committee on Veterans' Affairs. The purpose of this testimony is two-fold, as per your request. I will give the opinion of the Enlisted Association of the National Guard of the United States (EANGUS) with regards to S. 868 and proposed legislation concerning Veterans Reemployment Rights.

The Enlisted Association of the National Guard has a membership over 60,000 strong. We are the only Association working directly for the Enlisted men and women who serve in the Army and Air National Guard. We appreciate being asked to submit our testimony to your committee and do so with hopes of seeing legislation such as this become public law.

S. 868

We at EANGUS begun our statement by offering our support to this legislation. Since the beginning of Operation Desert Shield, the House of Representatives and the Senate have drafted legislation that makes the lives of any soldier who served more comfortable. S. 868 is another piece of legislation that counteracts many inconveniences that an individual who served might encounter. We applaud these efforts and will do all we can to promote this type of legislation.

The provisions included in S. 868 are another key to solidifying a complete benefits package for a vital part of our Nation's Armed Forces. The Selected Reserve forces have once again proven their importance within the Total Force. This statement in no way undermines any activity of the Active Component, but there is no question that these troops executed their duties in the best possible manner. In many respects, Operation Desert Storm was a "textbook" military operation. Never before has our military enjoyed such an overwhelming success. The troops who were called to serve and their leaders are almost solely responsible for this great triumph, but there is one facet within these forces that we feel needs to be included with regards to this benefit. This would be those individuals who volunteered for service in the Persian Gulf war. As we understand the amendments to read, the persons who benefit from this legislation are the members of the Selected Reserve who "had to discontinue such educational pursuit as a result of being ordered, in connection with the Persian Gulf War, to serve on active duty..." We would like to suggest that the amendment reads "... as a result of being ordered, or as a result of volunteering for service, in connection with the Persian Gulf War, to serve on active duty...". Although these individuals may have willingly discontinued there education to serve in Operation Desert Storm, we feel that their involvement in the war is valuable enough to have any lost education benefits restored to them. Volunteerism and a willingness to unselfishly fight for one's country are principles that should be rewarded. The first C-141 Starlifter loaded with men and equipment, headed for Saudi Arabia, was flown by a volunteer force from the Mississippi Air National Guard. This kind of dedication is the priciple on which our Nation's first volunteer Militia was founded on. We at EANGUS feel that the dedicated men and women who make that principle a reality today should be included in the list of personnel eligible for benefits under S. 868.

The second issue we would like to address concerns the unused amounts of monies remaining in the Department of Veterans Affairs Educational Assistance Fund. According to a briefing given by the DVA in March, there is approximately 745 million dollars lying unutilized in the education fund. These funds are collected solely for the purpose of helping deserving servicemen and women receive a higher education. We would like to suggest the possible expansion of the program to include Graduate level studies. Educational requirements for both the Enlisted and Officer ranks within the Armed Forces are continuously on the rise, threrfore, the education of today's modern soldier is critical to the success of our Nation's military. Today, the high tech world of computers, satellites and lasers dominate both the training field and the battlefield. In order for our soldiers to keep up with the advancement of technology, we feel that any opportunity to further enahnce one's level of education would be beneficial not only to our Armed Forces, but to the Nation as a whole. Allowing for these funds to be utilized for Graduate level programs will help to keep our Armed Forces highly educated and better prepared to handle their responsibilities while serving in the world's finest military.

VETERANS REEMPLOYMENT RIGHTS LEGISLATION

Improving the quality of life of our Nation's National Guard will always be a top priority for EANGUS. The issue of Reemployment Rights for Veterans is of special interest to our Association, because many of our members have been and will be directly affected by issues of this kind. We appluad the efforts set forth by Senator Cranston and this Committee with regards to Veterans Reemployment Rights.

The Enlisted members of EANGUS are the hometown shopkeeper, or the farmer, truck driver, or the factory worker who belongs to either the Army or Air National Guard. These people have an annual average salary base of between twenty and twenty-two thousnad dollars per year. They have families to support and bills to pay. These are the dedicated men and women who have become the backbone of our society. Not only are these people the backbone of our country, but they are also the backbone of the National Guard. Of the 567,000 members of the National Guard approximately 490,000 are Enlisted personnel. These working class people represent the majority of a vital part of our Total Force Structure. Due to the demographics of our membership, we are compelled to work intensely on securing benefits for the individual Soldier or Airman we represent.

This draft legislation has brought to light many of the questions that have been asked concerning Veterans Reemployment Rights. Critical areas of ambiguity have been addressed, and strict guidelines have been proposed. Such specific guidelines are a positive step towards better management of the law as it now stands.

Enforcement of the statute has been broadened. We feel that the affects of this will be manyfold. One positive affect of the added language concerning enforcement of violations is that it individualizes each case. This gives both the employee and the employer the individual ability to prove their respective grievances. The penalties levelled against a violating employer will also make fair the amount of restitution any given company will have to pay back to a former employee. Hopefully this will be decided based upon the severity of each specific violation. A possible enhancement of these enforcement guidelenes would be to include a manditory fine for flagrant repeat violators of the statute. We wish to protect a large number of people in one area from being affected by one large employer. We do not propose manditory fines for every violation, because we realize that every case will need to be dealt on an individual basis before any determinations about penalties can be considered. But we might suggest that a manditory fine be leveed against an employer who has violated the statute three or more times within a tweleve month period. We feel this would act as a further deterent to large corporations who would continue to abuse their rights as an employer even after one or two violations. As we are to understand, an employer upon being found guilty of denying reemployment under this staute would only have to pay restitution back to the employee "to compensate the person for any loss of wages or benefits suffered by reason of such employer's wrongful personnel action." For the individual this is fine, but to the conglomerate who has vast financial resources available to it, a few months lost wages might not be enough to keep that company from violating the law repeatedly. Given the diverse nature of American business, it would not be fair to set one standard fee that would be applicable to all violators. These flagrant violators would have to dealt with on an individual basis and fined according to the frequency and severity of the actions. Therefore, in order for all types of businesses to be treated equally with regards to penalties for violations, the penalty itself must be applied to each company on a regulated, proportional scale. This type of action, if set forth into public law, would make all companies, large and small, think twice before denying any member of our Armed Forces reemployment.

We would also applaud the addition of initial employment language into the draft bill. Not only has the Reemployment Rights issue been expanded upon, but initial employment issues have been included to further protect the men and women of our Armed Forces. With the passage of this draft legislation, it would then be unlwaful to deny employment to any "... person who performs, has performed, applies to perform, or has an obligation to perform..." in the Uniformed Services. With this language written into the bill, prospective candidates for enlistment in the Selected Reserve can enlist without fear of any negative affects on their ability to find or retain employment in the private sector. Not only does this add stability to lives of these individuals, but it further encourages enlistment into our Armed Forces. Higher recruiting figures help to solidify each individual force, thus ensuring the stability of our Total Force Structure.

We again would like to thank Senator Cranston and the distinguished Committee Members for inviting our opinion concerning both of the pieces of proposed legislation. We would like to see more positive steps such as these being made in the future.

CARL LEVIN
MICHIGAN

United States Senate
WASHINGTON, D.C. 20510

Carl Lev

Testimony of Senator Carl Levin
Senate Veterans Affairs Committee
Veterans' Reemployment Rights
May 23, 1991

Mr. Chairman, I appreciate the opportunity today to comment on provisions included in the Uniformed Services Employment and Reemployment Rights Act (S.1095). I am specifically concerned about the rights of service personnel to buy back into employee pension benefit plans upon returning from active duty.

Earlier this year, it was brought to my attention that returning personnel from Operation Desert Storm may not necessarily have the right to buy back into their pension programs for the period served in active duty at the usual rate of contribution. During floor debate on Desert Storm Supplemental Authorization legislation, I submitted a colloquy between myself and the distinguished Chair of the Senate Veterans Affairs Committee, Senator Alan Cranston. The colloquy sought to clarify the ambiguity in existing law regarding buy back rights.

NOT PRINTED AT GOVERNMENT EXPENSE

Existing law states that a veteran or reservist returning from service in the Armed Forces is entitled to the same status of employment had he or she continued in such employment uninterrupted. However, in a recent case in the federal district court in Denver, the Department of Labor argued that pension buy back rights should apply to defined contribution plans in addition to defined benefit plans. The court decided against this position and held that current law limits buy back rights solely to defined benefit plans.

A defined benefit plan is a pension plan that specifies the benefits received under the plan but does not specify the rate of contribution. An employer, for example, can define the benefit under this type of pension plan for an employee in a variety of ways: from paying a specified amount each month payable at retirement, to paying a set percentage of compensaion for each year the employee service. Under a defined benefit plan, the employer must advance fund the plan's liability and bears the risk of investment performance.

Defined contribution plans specify the contributions to the plan, but not the benefits. This type of pension plan provides for an individual account for each employee. Both the employer and employee make contributions to this account and benefits are restricted solely to the amount contributed and the investment earnings of the account.

I have introduced legislation (S.1255) which would guarantee that upon reemployment, service personnel could buy back into either a defined benefit plan or defined contribution plan. This bill stipulates that the contribution ratio between employer and employee for certain benefit plans would remain the same as when the employee left for active duty. On both of these points, the language of this legislation is more specific than S.1095. This legislation has an effective date of August 2, 1990 thereby applying to those who were covered by the Desert Storm call-up, as well as those in the future who are called up for more than 45 days.

I appreciate the willingness of the Senate Veterans Affairs Committee to incorporate the idea of ensuring that both types of pension plans are covered as reemployment rights for veterans into S.1095. I am aware that some fine-tuning may be needed in addition to the language in S.1095 and the legislation which I have introduced to clarify technical questions regarding the calculation of missed benefits. I am confident that the Veterans Affairs

Committee will address these concerns as it deliberates the Veterans Reemployment Rights legislation.

Mr. Chairman, I believe that the men and women who served our country so nobly in Operation Desert Storm should be able to get on with their livelihood once they return home. As part of that goal, it is important that service personnel be given the opportunity to put themselves back in the position that they would otherwise have been in with respect to their pension benefits. Returning personnel should not have to worry about any kind of ambiguity in the law regarding these rights. I applaud the Veterans Affairs Committee for its hard work in seeking to rework and strengthen the rights our veterans and reservists can expect when returning from active duty, and look forward to passage of legislation which will ensure complete buy back rights.

U.S. MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

STATEMENT

of the

MERIT SYSTEMS PROTECTION BOARD

SUBMITTED TO THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

CONCERNING

S. 1095, UNIFORMED SERVICES EMPLOYMENT
AND REEMPLOYMENT RIGHTS ACT OF 1991

MAY 23, 1991

The Bicentennial of the U.S. Constitution 1787-1987

We appreciate the opportunity to participate in the process of reviewing the benefits and protections available to veterans.

The Merit Systems Protection Board was established by the Civil Service Reform Act of 1978 as an independent, quasi-judicial agency with responsibility to protect the integrity of the Federal merit systems and ensure that Federal employees are protected against abuses by agency management. The Board is charged with responsibility to adjudicate appeals from personnel actions taken by the Federal government.

Among the cases the Board decides are those involving reemployment of Federal civilian employees following call up to military duty. A Federal employee who is not restored to his or her position, or an equivalent position, upon return from military service may appeal that failure to the Board. Although most agencies undoubtedly try to settle any reemployment issues amicably, in those instances where an employee contests an agency action, the Board serves as an independent forum to decide such disputes.

The Board's experience as the adjudicator of restoration actions involving Federal employees bears out the stated intent of the bill--that is, that the Federal government serve as a model employer in its reemployment practices. In over 10 years, the Board has issued decisions in only a handful of cases involving restoration to duty. The paucity of decisions suggests that Federal agencies restore most employees to their former positions voluntarily and work out any differences cooperatively. At the same time, the Board believes that the availability of an enforcement mechanism serves as the foundation for fostering amicable settlement of any disputes.

To facilitate the business before the Committee--S. 1095, the Uniformed Services and Reemployment Act of 1991--the Board will focus on the provisions of the bill that would establish procedures for Federal employees to obtain Board review of agency restoration actions. As the agency that would adjudicate the merits of any appeals that might arise under this legislation, the Board will not comment on the substantive provisions of the bill.

S. 1095 would amend Chapter 43 of Title 38 of the U.S. Code to clarify the enforcement mechanism for Federal employees challenging agency restoration actions following military service. The bill would give the Board statutory authority to decide disputes between a veteran and the employing agency. Currently, the Board decides such cases pursuant to regulations issued by the Office of Personnel Management (5 C.F.R. 353.401(a)).

To put S. 1095 in context, it is useful to be aware of the Board's existing practice in handling appeals of personnel actions, including restoration cases. An individual contesting an agency action may file an appeal with one of the Board's 11 regional offices. Board regulations require that appeals be filed, in writing, with the regional office serving the area where the employee's duty station is located within 20 days of the effective date of the agency action. The agency has the right to respond to an appeal.

After an appeal has been received in a regional office, it is assigned to an administrative judge. An appellant may request a hearing if the appeal is timely filed and the Board has jurisdiction. An individual has a right under Title 5 to have an attorney or other representative in the appeal. The Board regulations make clear that a party may appear pro se or may choose any representative as long as that person is willing and available to serve.

As part of a Board-wide effort to promote equitable and efficient resolution of disputes without litigation, administrative judges may initiate attempts to settle an appeal informally at any time. The Board's administrative judges use the full range of alternative dispute resolution techniques. For example, the administrative judges facilitate exchanges between the parties, suggest possible compromises, and assist in narrowing issues and reaching stipulations. They hold prehearing conferences in virtually every case. In Fiscal Year 1990, 49 percent of the appeals to the Board that were not dismissed for lack of jurisdiction or timeliness were settled.

The decisions issued by the administrative judges become final 35 days after issuance, unless any party files a petition for review at the Board level of the MSPB or the Board reopens a case on its own motion. The Board's decision is the final decision and represents the last administrative remedy in most personnel disputes. Judicial review of a final Board order lies generally in the United States Court of Appeals for the Federal Circuit. The Board handles requests for attorneys fees and other costs under 5 U.S.C. 1221(g) or 5 U.S.C. 7701(g) in separate proceedings.

From the Board's perspective as an adjudicative agency, the primary change S. 1095 would make in the enforcement mechanisms available to Federal employees challenging agency restoration actions lies in the grant of authority to the

Secretary of Labor to investigate claims and the Office of Special Counsel to represent claimants before the Board. The bill would retain, however, the right that an individual now has to appeal directly to the Board as soon as the action is effected. The bill would also provide an option for the individual to appeal to the Board at later stages of the process if the individual so chooses.

Although S. 1095 would provide new protections for the individual in a restoration action, it does not establish a new role for the Board. The Board's fundamental role--whether the claim of improper restoration to duty is brought by the Special Counsel or by the individual directly--would still be to act as adjudicator, just as it now serves in deciding restoration cases and as it generally serves in appeals of agency personnel actions.

Nor would the bill's grant of authority to the Board to decide cases litigated by the Special Counsel be entirely novel. The Board presently has jurisdiction over certain actions--for example, Hatch Act cases--that the Special Counsel prosecutes before the Board, and, in such cases, the Board acts as a specialized civil service tribunal. Under the bill, the relationship of the Special Counsel to the Board would be like it is in other cases--essentially that of a prosecutor to a judge.

Turning to the process of Board review of restoration cases contemplated by S. 1095, we note an important feature of the legislation. Although the bill would mandate certain basic procedural rights, it does not address the details of case processing before the Board. We believe that it is generally appropriate to leave such matters to the agency that is delegated the overall responsibility for carrying out the particular function. For that reason, however, it is important that there be no question of the Board's authority to issue implementing regulations.

As drafted, S. 1095 would not give the Board explicit regulatory power under Chapter 43 of Title 38, U.S. Code. The bill does not appear to preclude the Board from issuing regulations, and, there is a strong argument that the Board's general regulatory power set forth in Title 5 is sufficiently broad to allow it to implement supplementary procedures. However, because of the importance of this authority in the case handling process, we urge the Committee to consider adopting a provision granting the Board explicit regulatory power to carry out its functions under this Chapter. Making the Board's regulatory power explicit for Chapter 43 purposes would assure that the Board could issue regulations tailored to the requirements of restoration cases without risk that case processing would be delayed because of challenges to its regulatory authority. H.R. 1578, which passed the House on May 16, 1991, included such a provision.

It seems likely that regulations to handle restoration cases will have to be issued if S. 1095 becomes law. Although it may be that many of the Board's existing procedures can be applied to restoration cases, the regulations, as presently written, probably would have to be revised to accomplish that. Moreover, it cannot be assumed that the Board's existing procedures will cover all aspects of the appeals brought under Chapter 43. For example, if an individual seeks the assistance of the Secretary of Labor or the Special Counsel, notice of the exhaustion of those steps is prerequisite to filing an appeal with the Board. Since no other Board appeal comes to the Board in precisely that way, the Board might well find that it would be useful to claimants and to the Board itself to spell out through regulation the procedures to meet such filing requirements.

The affirmative grant of express regulatory power to the Office of Personnel Management (OPM)--and the concurrent prohibition on OPM's issuance of regulations relating to Board activities under Chapter 43--makes the need for clarification of the Board's regulatory authority under Chapter 43 all the more acute. The bill's language on its face could create doubt as to where the affirmative grant of regulatory power lies. If the intent of the regulatory provision is not to bar the Board from issuing regulations but simply to ensure that the statutory grant of authority to the Board is not limited through OPM's regulatory power, adding a provision giving express regulatory authority to the Board would meet this concern and, at the same time, expressly permit creation of procedures to meet the special requirements of restoration cases.

An explicit grant of regulatory authority to the Board in Chapter 43 may also serve the interests of potential appellants, as a flag to use the facilities of the Board in filing appeals. Board regulations have recently been revised to be easier for appellants to understand and are designed to assist appellants in filing appeals. For example, the Board's current regulations include a list of the addresses and fax numbers of the Board's regional offices and an appeal form that the Board offers to ease an appellant's task of determining what information is critical to filing an appeal.

Finally, we point to some specific provisions of S. 1095 that may be usefully viewed in the context of existing Board practice.

--The right to representation: Section 4333(b)(1) would grant an appellant the right to be represented by an attorney or other representative. That provision is expressly keyed to the Board's current practice. As drafted, the provision should not require a change in Board procedures but simply provide an express reminder in Title 38 of the right of Federal employees to representation in pursuing a restoration appeal to the Board.

--The Board's remedial authority: To the extent that Section 4333(c)(2) of the bill would grant the Board general authority to order compliance with Chapter 43 and compensatory relief for an individual upon a finding of a violation of Chapter 43, it is consistent with the kind of relief authorized by Title 5.

The bill would, however, define the scope of the Board's authority to order compliance and compensatory relief differently from the Board's authority under Title 5. Specifically, the bill would authorize the Board only to order an "officer" to comply and grant relief to the claimant. In contrast, the Board's authorizing statute, 5 U.S.C. 1204(a)(2), grants the Board the power to order "any Federal agency or employee" to comply with a final Board order. It is traditional to look to Title 5 for definitions of such terms (See 5 U.S.C. 2104-2105. See also 5 U.S.C. 105, defining the term Executive agency). By specifying that an order may be entered against an "officer," the bill appears to create differences in the remedy available to Federal employees pursuing relief in reemployment actions under Chapter 43 and those pursuing relief from other personnel actions.

--Attorney fees: Section 4333(c)(4) would expressly authorize the Board to award attorney fees, expert witness fees, and other litigation expenses in an appropriate case. Other appellants are given similar special protection in certain appeals (See 5 U.S.C. 1221(g) and 5 U.S.C. 7701(g)).

--Judicial review: Section 4333(d) would make the United States Court of Appeals for the Federal Circuit the reviewing court for Board decisions. This is consistent with the present structure for judicial review of Board decisions. Before the Civil Service Reform Act, the decisions of the Civil Service Commission could be appealed to a Federal district court and then to the appropriate United States Court of Appeals. Under present law, however, the Federal Circuit is the primary reviewing court for Board decisions. This structure for judicial review of Board decisions has been important to the development of a body of consistent and predictable civil service law. The express provision that the decisions in restoration cases would be reviewed by the Federal Circuit eliminates any question about the reviewing entity and also notifies the individual that review of the administrative decision is available.

As we read it, however, S. 1095 would not allow the same scope of judicial review as is provided under 5 U.S.C. 7703. Although the bill generally states that judicial review accords with the procedures set forth in Section 7703, the express language of the provision limits judicial review to only an order that "denies" the relief sought. Section 7703(a)(1) is not so limited. It provides that an appellant who is "adversely affected or aggrieved" by a final order of the Board may obtain judicial review. A change making the provisions congruent would eliminate an apparent basis for litigation over the scope of judicial review.

Thank you again for the opportunity to present our views. We would be pleased to work with the Committee and the staff in addressing these or other matters and in formulating review procedures that will protect the rights of Federal employees and agencies.

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May 10, 1991

The Honorable Alan Cranston
Chairman, Senate Committee on Veterans Affairs
United States Senate
414 Senate Russell Office Building
Washington, DC 20510-6375

Dear Senator Cranston:

On behalf of the National Association of State Approving Agencies, I am very pleased to extend our support for S.868, a bill to improve educational assistance benefits for members of the Selected Reserve of the Armed Forces who served on active duty during the Persian Gulf War, and for other purposes.

We believe that the members of our Armed Services who served during this period of time deserve fair and equitable treatment, certainly equal to the support that they gave to their nation during a time of international crisis. The provisions of S.868 provide one way for our Nation to express its appreciation for the dedication and untiring efforts of those who served in Operation Desert Storm. Restoring entitlement to educational assistance programs, in which many of our Desert Storm servicemembers were participating prior to being called to active duty, also will be demonstrative of our Nation's support for increased and continuing educational achievement.

Thank you for the opportunity to comment on S.868 and for your support of our Nation's military personnel, veterans and their dependents.

Sincerely,

C. Donald Sweeney

C. Donald Sweeney
Legislative Director

ht

c Dr. Paul Gulyas

TESTIMONY OF

Ronald H. Atwell, President,

National Association of

Veterans Program Administrators (NAVPA)

before the

Senate Committee on Veterans' Affairs
Room 418, Russell Senate Office Building
Washington, D.C. 20510

May 23, 1991

Mr. Chairman and members of this committee, on behalf of the National Association of Veterans Program Administrators (NAVPA), I wish to thank you for the opportunity to present our views concerning Senate bill S. 868.

We in NAVPA are very concerned with ensuring that educational benefits, and other forms of financial aid, for individuals who participated in the Persian Gulf War are protected. We also are extremely interested in assuring that the interruption to the individuals' education is minimized to the greatest extent possible.

S. 868 addresses one of the most important issues to the returning students who participated in the Persian Gulf War. The students are very concerned about the lost benefits and the amount of remaining Veterans education entitlement. The veterans and reservists are also very concerned about the length of time remaining on their entitlement.

NAVPA fully supports all efforts to restore education entitlements for those students who were called to active duty for the Persian Gulf War. A significant number of students from schools across the nation were called to active duty. These students interrupted their education for service to their country, and in the process lost entitlement. We are very pleased to see that these provisions would apply to all education chapters (30, 32, 35, and 106), as well as all members of the military service (active duty, Guard and Reserve members). We would also strongly recommend that these provisions be applied to all individuals who served, regardless of their assignment location.

Our only concern is how these provisions will be applied. Under guidelines established by the DVA, activation was considered mitigating circumstances and repayment of education benefits for the period before the last date of attendance was not required. We feel that even though benefits payments were received, the benefit entitlement should be restored. Even if full tuition refunds are given, the individual had still incurred out of pocket expenses. For that reason NAVPA believes that benefits should be restored regardless of the institution's refund policy. Only in those cases where the student was allowed to complete some or all of the courses should reinstatement of lost benefits be prohibited, and then only for that portion which was completed and credit awarded.

NAVPA also supports the provisions of S. 868 that would automatically extend the individual's delimiting date for a period equal to their active duty service during the Persian Gulf War. Although current Department of Veterans' Affairs regulations recognize military service as justification for extension of delimiting date, we feel that there is a need to mandate the provision. By doing so there can be little misinterpretation of what constitutes justification for an extension under these circumstances. Further, NAVPA feels very strongly that this provision should be applied to all chapters (30, 32, 35 and 106), as well as all members of the military service (active duty, Guard and Reserve members).

NAVPA does suggest one clarification. The bill specifically addresses the extension of delimiting date for Guard and Reserve personnel participating in Chapter 106 of title 10. As presented this would omit the many Persian Gulf War participants who were Guard and Reserve members, including Inactive Ready Reserves (IRR), but were receiving benefits under Chapters 30, 32, or 35 of title 38. These individuals also had their education interrupted and we strongly recommend that their 10 year delimiting period be extended for the amount of time equal to the interruption of training. Which brings up an additional point: It is important to note that the number of months an individual spent on active duty is not necessarily equal to the amount of educational opportunity lost because of this service. For example, a student who was activated on September 15, 1990 and released on April 15, 1991 served at total of eight months. Under the provisions of this bill, an extension to the delimiting date of eight months, equal to the time of active duty, would be granted. However, in reality this student might have lost two semesters (nine months) or three quarters (ten months) of the academic year. We therefore propose that a different method be employed for those individuals who were using their education benefits when called to active duty. Instead of using the active duty period to determine the amount of the extension, the number of actual academic terms lost would be used to calculate the number of months to be added to the delimiting date. In no case should the extension period be less than the actual time served on active duty. We understand that this would place an additional burden upon the Department of Veterans Affairs, and possibly schools, to make this computation. However, for this bill to truly protect the educational entitlement of the Persian Gulf War participant this provision is necessary.

I thank you very much for the opportunity to testify before the Senate Committee on Veterans' Affairs. My colleagues and I commend the work that has been done by this committee to improve and ensure the success of Veterans Educational Assistance programs.

NATIONAL GUARD ASSOCIATION OF THE UNITED STATES

ONE MASSACHUSETTS AVENUE, NORTHWEST • WASHINGTON, D.C., 20001 • (202) 789-0031

STATEMENT FOR THE RECORD
of the
NATIONAL GUARD ASSOCIATION OF THE UNITED STATES
to the
Committee on Veterans' Affairs
of the Senate

23 May 1991

INTRODUCTION

It is a pleasure for the National Guard Association of the United States to represent the views of the officers and warrant officers of the National Guard before this Committee. We view the issues being considered today as very important to the writing of the closing chapters of Operation DESERT SHIELD/DESERT STORM. The first chapters are a clear validation of the success of the Total Force Policy.

The Selected Reserve GI Bill has been an extremely valuable benefit in developing and sustaining the high quality of the National Guard force. Equally essential to maintaining a quality force, is the ability to balance the demands of National Guard service with maintaining a secure civilian occupation.

Your committee is considering legislation that will make education benefits and reemployment rights programs more responsive to the current world situation and more valuable to National Guard and Reserve personnel. The National Guard Association applauds the Committee's efforts.

EDUCATION BENEFITS

The Selected Reserve GI Bill has been an important factor in attracting and retaining quality, dedicated personnel for the Army and Air National Guard. The program has supported National Guard officer and warrant officer personnel in achieving the required civilian education levels and enlisted personnel in meeting desired education goals.

Over the course of the six years of the program, the levels of participation have steadily increased. The activation and deployment of over 220,000 members of the National Guard and Reserve had an immediate and adverse impact on continuation of college course work. The major portion of the activations took place during the heart of the school semester, requiring individuals to leave school. A small number of members were within days of having started courses, while a significant number of those activated were well into the semester or, even worse, within days of finishing.

The House and Senate versions of the Persian Gulf War Veterans Benefits Act, H.R.1175 and S.578, took steps toward returning lost benefits to affected personnel and strengthening the program in general with increased monthly rates. P.L. 102-25 is the agreed upon compromise. It addresses payment increases, but does not give back credit for the lost months of eligibility. The proposed legislation, S. 868, under consideration by this Committee, would return the precious time that was lost. Further, it would extend eligibility to use the benefit with a period equal to the number of months of active duty service.

Of equal importance for the National Guard, is the third provision of the bill. Unlike the active duty education benefits, eligibility for the Selected Reserve program terminates if the individual separates from National Guard or Reserve service. Section 2 of S. 868 specifies that the active duty service performed in support of the Persian Gulf conflict will not be considered separation from the Selected Reserve for the purposes of this benefit.

REEMPLOYMENT RIGHTS

Families and employers play a critical role in the decisions of members of the National Guard and Reserve to serve. Their support is based on the member's ability to balance both civilian career and military service without short changing either. The underpinning of reemployment rights policy is important in building the necessary sense of job security.

Employers have a need and a right to know their obligations and protections when they hire citizen-soldiers. The current laws have provided a good foundation but require clarification. The demands of National Guard service under the Total Force Policy have greatly expanded over the past decade requiring increased amounts of training time.

The experience of Operation DESERT SHIELD/DESERT STORM, particularly occurring during an economic recession, have pointed out some problem areas that need to be resolved. Job security is essential to retention. For most members of the National Guard, their military service is an avocation, an expression of patriotism. At the same time, they have a vocation or career. They also have a need to know very clearly their obligations and protections under the law.

The National Guard Association was highly pleased with the overall response of employers during the Desert Shield/Desert Storm operation. Many went well past the legal requirements to ensure their employees were covered, to the extent possible, with continued benefits and even income during their military service. While there are always some exceptions, the employers appear to have at least complied with the current law.

The Bill under consideration today, S. 1095, would help to clarify some of the confusing provisions in current law. Although we have not had an opportunity to make a detailed review of all provisions in the Bill, we support the provisions which will spell out federal government responsibilities, including establishment of an outreach information program. We also support the efforts to simplify various provisions such as length of service limitations, time periods for returning to work and requirements for attempting to place disabled members in available positions.

We remain concerned, however, that we not overburden the employer in an attempt to greatly strengthen protections for the military member. The day-to-day relationship between employer and member of the Guard depends to a great extent on continued strong support of the members military career. That support cannot be entirely dependent on provisions of law. It is a relationship that is nurtured on a continuous basis.

We encourage the committee to continue to incorporate the concept of reasonableness in the reemployment rights legislation. We believe the Bill under consideration will help to clarify responsibilities, however, we need some additional time to review several provisions such as the revised treatment of temporary employees. The result of assuming continuous employment for up to five years for a temporary employee is not very clear. The majority of the provisions in the Bill are certainly clear, and the National Guard supports the attempt to clarify and improve reemployment rights for National Guard members.

SUMMARY

The Persian Gulf War has fully validated the wisdom and capability provided by the Total Force Policy. The National

Guard has proven its readiness and the willingness of its personnel to fulfill their commitment. They willingly stepped up to the sacrifices that were required of them.

The final chapter of the War is being written now and over the next few months. History has shown that the homecoming process is an extremely important one. The future of the Total Force will be materially affected by the way military personnel are helped to reestablish the normalcy of their lives. Restoration of education benefits shows an appreciation of the sacrifices and a recognition of the importance of a quality force.

From a recruiting and retention standpoint education benefits are essential. Another critical element in the willingness of the citizen-soldier to be ever ready to step into the military role is the confidence that his or her civilian career is safe. The balance between livelihood and duty to nation is a delicate one. Clear and responsive reemployment rights policies tip the balance in favor of continued service to both.

The efforts of this committee will have a lasting affect on the last chapter of the Persian Gulf War. They will also influence the quality of the Total Force of the future.

On behalf of the men and women of the National Guard, we want to thank you for your support.

STATEMENT BY

RADM PHILIP W. SMITH, USNR (RET)

DIRECTOR OF LEGISLATION

OF THE

NAVAL RESERVE ASSOCIATION

TO THE

SENATE COMMITTEE ON VETERAN'S AFFAIRS

23 MAY 1991

Mr. Chairman, distinguished members of the Committee, it is indeed a privilege to have this opportunity to present the views of the Naval Reserve Association to the Committee for your consideration.

S-868, a bill to improve educational assistance benefits for certain servicemen and reservists who served during the Persian Gulf conflict, restores interrupted educational entitlement and extends time limits for educational benefits purposes. This bill embodies most of the pertinent provisions of H.R. 1175 that were not included in Public Law 102-25, and appears to adequately address the Restoration of Educational Assistance and Delimiting Entitlement Date problems of recalled reservists. The Naval Reserve Association has no specific recommendations for S-868.

The current Veterans' Reemployment Rights statute needs revision because the law is, in its present form, difficult to to understand and administer, and needs to be strengthened to prohibit discrimination or reprisals against veterans and reservists.

This hearing is particularly timely since the Department of Defense has recently activated over 220,000 reservists and members of the National Guard to support Operation Desert Shield/Storm, including over 60,000 who served in the Persian Gulf Over 20,000 Naval Reservists answered the call, with a substantial number being medical professionals serving in Navy Field Hospitals supporting the combat Marines in the Persian Gulf War. An Interagency Task Force recently completed and forwarded to Congress their revised VRR law entitles "Uniformed Services Employment Rights Act." HR-1578 recently enacted by the House of Representatives, is similar to the Task Force draft VRR Act in many respects but strengthens and extends reemployment rights. Both proposals continue the basic substantive rights of the VRR law, and make is more easily understood and enforced. In lieu of a section by section examination of the S-1095 revision of Chapter 43, Title 38, U.S. Code, I would like to key on a few salient features of special interest to our reservist members.

The unnecessary distinctions between types of military training and service have been eliminated in both the HR-1578 and the S-1095 revision of Chapter 43, Title 38, U.S. Code. This greatly simplifies the Act and promotes better understanding and enforcement.

The current VRR law lacks subpoena authority to assist and speed up the investigative process by the Department of Labor. Both proposed revisions of the act now contain this subpoena authority which has long been needed to assist the investigations on behalf of the veteran/reservist.

When reservists ask their employer for time off to attend military training or active duty and the employer says no, threatening to fire the reservists if they comply with their military orders, the reservists should not be required to report for military duty on the bet that they will win their reemployment case after they return from duty. Declaratory or injunctive relief should be available to the reservist in such a situation, before they leave their job for military service. At least one draft bill proposal provided for such injunctive/declaratory relief for threatened violations, while the this Committee's S-1095 and the final form of H.R. 1578 do not. In the view of the Naval Reserve

Association, injunctive relief is a very important feature for protection of the veteran/reservist.

From our membership there have been some reports of delays in the investigative process by the Department of Labor, reportedly as a result of a limited number of investigators. Also, District Attorneys and their staffs have heavy case loads of major drug cases, etc. so that a few hundred or even a few thousand dollars in back pay for a reservist may not be considered a very high priority case. Hence, resort to private counsel may become an imperative in some instances to enforce rights under the VRR law. A majority of the veteran/reservist claimants are middle or lower income persons with limited means to pay legal and investigative fees, and the sums normally involved are often not attractive for contingent fee arrangements. The Naval Reserve Association is pleased that this Committee provides for the discretionary award of reasonable attorney fees, expert witness fees and other litigation expenses to a prevailing complaintant. However, in this Committee's draft bill the complaintants could not avail themselves of private counsel until the Attorney General refused to commence an action. Hence undue delays could be occasioned awaiting such "refusal." The revised Section 4334 contained in S-1095 corrects this problem and provides for alternate representation without conditioning the recourse upon Attorney General action.

Historically, a disproportionate number of complaints have been filed by Guard/Reserve personnel who are Federal employees. The federal government should be a model employer with respect to "employer support of the Guard and Reserve" and set an example for the private employer. Both acts have improved the enforcement procedures for Federal employees and provide for representation of the Federal employee by the Office of the Special Counsel in appeals to the Merit Systems Protection Board. This Committee's S-1095 bill provides for representation by the Special Counsel for review of a final order or decision of the Merit System Protection Board while HR-1578 does not. This provision is more consistent with the relief accorded non-Federal employees.

Both acts have adequate and similar provisions preserving insurance, pension and fringe benefits for the returning veteran/reservist.

H.R. 1578 provides for a civil penalty of $25,000 for an employer who willfully fails or refuses to comply with the provisions of the Act. NRA has concerns that this could have a negative impact on the hiring of reservists/guardsmen. S-1095 contains no such punitive enforcement provision and provides remedial relief instead.

This Act amending Title 38 United States Code, Chapter 43, and the Uniformed Services Employment Rights provisions of H.R. 1578 and Persian Gulf Personnel Benefits bills are evidence of the great progress made in providing job protection for our reservists this year. Thank you for your continued attention to this serious problem for Reserve Component readiness, and thank you for giving me the opportunity to testify here today.

If you have any questions, I will be happy to try to answer them.

NCOA

Non Commissioned Officers Association of the United States of America

225 N. Washington Street • Alexandria, Virginia 22314 • Telephone (703) 549-0311

Statement of

Charles R. Jackson
Executive Vice President

Submitted To

Committee on Veterans Affairs
United States Senate

on

Education Program and Reemployment Rights Improvements

May 23, 1991

Chartered by the United States Congress

Mr. Chairman, the Non Commissioned Officers Association of the USA (NCOA) sincerely appreciates this opportunity to share with the committee its views on proposed improvements in veterans education and reemployment rights benefits. Additionally, the association commends the committee for conducting hearings on these most important issues.

VETERANS REEMPLOYMENT RIGHTS

The recent activation and deployment of a significant number of military reservists and guardsmen has demonstrated substantial deficiencies in public law regarding the reemployment rights of such personnel. Issues such as the reemployment of those who were disabled by service, the continuation of employer sponsored benefits during service, the obligation of employers to protect reemployed veterans against lay-offs and dismissal, and the court drawn doctrine of "reasonableness" in the application of reemployment claims have all served to confuse the employment community. Further, they have worked to the disservice of veterans.

On Thursday, May 16, Chairman Cranston introduced the Uniformed Services Employment and Reemployment Rights Act of 1991, a bill that would modernize and overhaul the reemployment rights provisions of law. This measure, S. 1095, is a very thoughtful and comprehensive proposal that addresses all the currently identifiable concerns existing in this area. NCOA also notes however, that the bill is similar to the House proposal on this issue but not exactly the same in its language. For example, the House bill would extend reemployment protections to merchant mariners and members of the National Oceanographic and Atmospheric Administration, a provision NCOA is not convinced is justified. Meanwhile, the Senate bill is more generous in allowing veterans who have been activated for 31 to 180 days a full 31 days to apply for reemployment instead of the 14 days suggested in the House bill, a Senate provision NCOA would certainly support. The association is also compelled to note that the Administration has endorsed the House bill, notwithstanding its shortfalls. Yet NCOA does not find the provisions of either bill in any respect totally unacceptable.

Accordingly, NCOA urges this committee to advance the Chairman's proposal and encourages this committee to move swiftly towards reaching resolution with the House on the issues in disagreement.

EDUCATION BENEFITS RESTORATION

In so far as it goes, S. 868, a bill that would restore education benefits to servicemembers who lost entitlements during deployment during the Persian Gulf war, is also quite supportable. Again, while not exactly the same as the House proposal, the bill seeks to make-whole those who suffered a personal loss as a result of service in the armed forces.

Mr. Chairman, focus was drawn to this issue during the recent, massive deployment of servicemembers in connection with Operation Desert Storm. However, NCOA asserts that the need for the relief proposed in S. 868 is more than transitory. Certainly participants in major operations in Panama, Grenada, Nicaragua and elsewhere would have benefited from this type of relief if it had been available previously. Moreover, on a smaller scale, the need for such permanent authorization is demonstrated daily by the unexpected deployments of units and individuals to satisfy military, diplomatic and humanitarian missions. Accordingly NCOA urges this panel to take the lead in providing permanent, prospective relief to veterans in this area.

EDUCATION PROGRAM IMPROVEMENTS

Mr. Chairman, NCOA continues to be deeply disappointed that neither Congress nor the administration has proposed the creation of a G.I. Bill for persons serving in the armed forces during the Persian Gulf war. G. I. education benefits have been a staple of wartime service in the armed forces since World War II, but there has been no discussion of creating such benefits during this period of conflict. Parenthetically, we might add that there has been no discussion of providing any of the traditional wartime benefits (i.e. free home loans) to Persian Gulf veterans.

Shamefully, many Persian Gulf veterans will have no G.I. Bill at all. For those who enlisted between January 1977 and

June 1985, a G.I. Bill does not exist. And, many of those who enlisted since July 1985 could not enroll in the Montgomery G.I. Bill because of financial obligations to family and others.

Some are willing to justify this slight of Persian Gulf veterans by suggesting that this was an all volunteer force. This is simply not true. More than 90,000 regular servicemembers were, if not conscripted, at least impressed into additional service by military "stop-loss" policies which prohibited the discharge or retirement of servicemembers, who had completed theior obligated service, during the Persian Gulf campaign.

As a matter of equity NCOA urges this committee to establish a non-contributory, Vietnam era type G.I. Bill for Persian Gulf veterans. Such a bill should also benefit those reservists who were activated for a qualifying period of service during the Persian Gulf "era".

In the event the committee finds our argument for a new G.I. Bill unconvincing, NCOA offers the following recommendations for improvements in the Montgomery G.I. Bill.

o Authorize refunds of pay forfeitures made for MGIB participation by veterans who die from service connected causes after leaving service. Such refunds are already authorized on the basis of in-service deaths.

o Open enrollment in the Montgomery G.I. Bill for servicemembers who initially enlisted in the armed forces between January 1, 1977 and June 30, 1985. It would only be fair to make all Persian Gulf veterans eligible for the same education benefits.

o Increase benefits under the Montgomery G.I. Bill to at least $468 per month and index those benefits to increases in education costs. This figure represents the indexed payments currently authorized in the education test program created in 1984 [10 USC 2141 et seq] as a precursor to enactment of the Montgomery G.I. Bill.

o Open enrollment at reenlistment to those who previously declined participation in the Montgomery G.I. Bill.

CONCLUSION

Mr. Chairman, once again, NCOA expresses to the committee its sincere appreciation for holding these hearings and for inviting the association's participation. Hopefully the committee will find our recommendations useful in their deliberations.

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

MAY 13 1991

Honorable Alan Cranston
Chairman, Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I thought you would like a summary of the Federal employment policy actions taken to help the men and women of the United States Armed Forces since the start of Operation Desert Storm/ Desert Shield.

On August 23, 1990, the day after President Bush authorized calling the Selected Reserve to active duty, we issued a special directive reminding all agency heads and personnel directors that every permanent employee called to active duty has a right to reemployment. We encouraged agencies to place those employees on leave without pay, rather than separating them, to protect and continue health and life insurance coverage for them and their families. In September, we issued regulations formally waiving the employee share of health insurance premiums.

Following the success of allied military operations in the Persian Gulf region, the President instructed agencies on March 8, 1991, that members of the Armed Forces Reserve and of the Army and Air National Guard returning to Federal civilian employment should be restored to the same jobs they left, and the agency option of placement in equivalent jobs should be used only when absolutely necessary. The President also announced that returning employees should receive 5 days off, without charge to leave.

Keeping in mind the regular members of the Armed Forces who may be seeking civilian jobs after they complete their military service, the President at the same time instructed OPM to work with agencies to ensure that Federal civil service opportunities are made available to the greatest extent possible to these veterans, particularly those who have become disabled through military service.

To recognize the special sacrifices and outstanding performance of the Armed Forces, President Bush issued Executive Order 12754 on March 12 creating the Southwest Asia Service Medal for active duty personnel serving in military operations in Southwest Asia on or after August 2, 1990.

The award of a campaign medal is a basis under civil service law for receiving veteran preference in Federal employment. OPM spread the word about this new veterans benefit through a March 14 nationwide news release sent to the media, congressional committees, veterans organizations, military activities, agencies, and the public.

On April 6, 1991, the President signed legislation establishing a Governmentwide leave bank program for Federal employees who served in the Gulf. This program will enable Federal employees to contribute unused annual leave to a leave bank that will be divided equally among all returning Federal employee reservists who served during the Persian Gulf War.

OPM has met, and will continue to meet, with veterans groups and agency officials to keep them fully informed. We are preparing more detailed instructions for agency personnel directors and OPM regional and local area offices to help assure that veterans receive up-to-date information and a helping hand as they make their way back to civilian life. To this end, we will designate a staff member in every local OPM office as the principal contact for veterans inquiries.

In addition to assisting Gulf War participants, we also are supporting agencies with Desert Shield/Desert Storm responsibilities in many ways:

- Delegated authority to the Department of Veterans Affairs, as requested, to waive reduction in salary or retirement pay requirements for the temporary reemployment of retired annuitants needed to perform direct patient care, related medical services, or claims adjudication.

- Authorized the Department of Defense to make special emergency-indefinite appointments.

- Delegated authority to the Department of the Air Force and the Defense Logistics Agency to extend the services of temporary employees beyond normal time limits, when necessary to support Desert Shield/Desert Storm workloads.

- Authorized the Department of the Army to extend temporary promotions of employees deployed to Southwest Asia in support of Desert Shield/Desert Storm.

- Participated in ombudsmen training workshops sponsored by the National Committee for Employer Support of the Guard and Reserve.

- Improved Federal job placement opportunities for the family members of United States military and civilian personnel relocated to the United States from overseas as a result of the Gulf conflict.

- Authorized an exception to the limitation on premium pay that may be paid during any one pay period for employees performing overtime work in connection with Operation Desert Storm. This exception was authorized for work performed after mid-March under a new provision of law enacted as part of the Federal Employees Pay Comparability Act of 1990.

On March 22, President Bush approved Public Law 102-16, which includes major improvements in the Veterans Readjustment Appointment program for Vietnam and post-Vietnam era veterans seeking Federal employment. Those changes should increase the opportunities of qualified veterans for quick, direct hiring by agencies, without having to compete in civil service examinations. I know the Committee on Veterans' Affairs was responsible for the development of that legislation. This new law is also a timely reminder to all that there are needs of the Vietnam era veteran which remain to be filled. While immediate attention is focused on veterans of the Persian Gulf, we will be asking agencies to keep in view the concerns and rights of veterans of earlier conflicts, especially those who served during the Vietnam era or were disabled by military service.

Responses to these actions have been most favorable. I particularly was pleased and moved by the enclosed letter from Mr. Joseph E. Andry, National Commander, Disabled American Veterans.

Copies of issuances to agencies are enclosed for your reference.

Sincerely,

Constance B Newman

Constance Berry Newman
Director

9 Enclosures

Statement of Major General Evan L. Hultman, AUS (Ret.), Executive Director, Reserve Officers Association of the United States before the Senate Committee on Veterans Affairs regarding education and employment legislation--23 May 1991.

Mr. Chairman and Members of the Committee:

On behalf of the 115,000 Reserve Officers Association members from each of the uniformed services, I appreciate the opportunity to present to the committee the association's views on the "Persian Gulf Veterans Education Assistance Amendments" and the "Uniformed Services Employment and Reemployment Rights Act of 1991".

First, I want to commend the committee for responding to the needs of Reservists who have been called to active duty and would benefit from the provision or restoration of educational assistance and those who are now concerned as to whether or not their jobs will be waiting for them when they are released from active duty. Educational assistance has always been and continues to be an important incentive in attracting and retaining qualified personnel in the Guard and Reserve. Reemployment rights, or the ability of an individual Reservist to continue his or her employment with a civilian or governmental employer, are critical to retention in the Reserve components and thereby are essential to the success of the Total Force. But before focusing on the needs of Reservists and the adequacies of the law, I would like to comment briefly on the call-up of members of the Reserve components in support of Operations DESERT SHIELD and DESERT STORM.

When the ground war began on 16 January, there were roughly 540,000 military personnel in the Persian Gulf. Nearly 106,000 of those deployed to the gulf area were members of the National Guard and Reserve, about one fifth of the forces deployed. In addition, a total of roughly 228,000 Reservists were ultimately activated in support of Operation DESERT STORM. The Chairman of the Joint Chiefs of Staff used the word "magnificent" in describing the contributions of these Reservists.

Reserve forces involvement in Operation DESERT STORM confirms the critical importance of Reserve components as integral parts of the Total Force. Reservists have every reason to be proud of their contribution, but the contributions made by Reservists were not without hardship.

ROA applauds this Committee for its recognition of those whose educational programs were interrupted by their activation and commends this effort to restore the educations benefits which would otherwise be lost. We believe the Persian Gulf Veterans Educational Assistance Amendments are needed and well deserved.

The size of the Reserve component contribution to Operation DESERT STORM suggests that there are and will be a great many Reservists needing reemployment following their release from active duty. It has to be assumed that, unless these Reservists have jobs to return to, many will opt out of the Guard and Reserve. Related to a basic right of reemployment are protections for seniority, status, and the employee's pay rate that could be affected by a call-up. Reservists routinely make sacrifices as a part of their service, and left without strong employment and reemployment protection, few would be able to continue to serve.

The importance of employment protection is reflected in the great number of calls ROA received from Reservists who were ordered to active duty and from Reservists who anticipated being activated. Reservists had a lot of questions relating to the call-up, but many of their questions related specifically to reemployment rights. Calling the association were also employers, the press, and many personnel consulting firms who had questions regarding the law.

Statutory employment or reemployment protection is crucial to the ability of the Reserve components to attract and retain qualified personnel. In order to protect the rights of the Reservist --and the rights of the employer--the statues must be easily interpreted and understood. The proposed legislation goes a long way in eliminating many existing ambiguities in the law.

Having emphasized the importance of clear and unambiguous statutory employment protection, I would caution that legislation has its limits. It would be unwise and impractical to try to anticipate every circumstance and provide a legislative solution in each case. Laws that go too far in protecting the rights of the employee may in the end be counterproductive. Statutory protections provide a foundation for the necessary cooperation of employers, but statues are no substitute for goodwill. The proposed legislation appears to be cognizant of that fact. We believe that legislative initiatives should foster the enthusiastic voluntary cooperation and support from employers.

The exclusion of "temporary" employment by current law has created ambiguities and has denied protection to some employees who should probably have been protected. The inclusion of temporary employment in S. 1095 will significantly improve the law.

There has been the concern that there is no one agency responsible for the administration and enforcement of reemployment laws. The responsibility for reemployment rights of federal workers has particularly been lacking. The division of responsibilities often frustrates and delays compliance and the resolution of infractions of the law. It further makes it very difficult to fix responsibility for enforcement. While the proposed legislation promises to improve compliance through clarification and a better understanding, the responsibility for enforcement remains divided and continues to be a concern.

While the responsibility for enforcement remains divided, which may be unavoidable, S. 1095 does provide the Secretary of Labor subpoena authority needed to insure that complaint investigations are adequate and timely. This is a much needed provision.

Current law provides different time periods given to an employee to report to an employer for reemployment following military service. The different time periods are governed by the type of call-up or duty and not by the length of service, per se. The type of call-up of duty performed is not important to the employer, but the length of service is important and should be the only governing factor. The proposed legislation appears to correct this deficiency.

The employment rights bill addresses periods of time during which a person who is reemployed by an employer cannot be discharged from employment, except for cause. While the proposed language may appear to provide additional protection, by providing statutory periods, the proposal implies that after these time periods an employer is free to discharge the individual following active duty service in the uniformed services. The implication may actually cause employers to discharge more personnel who are participating in Reserve programs at the end of the statutory periods and thus affectively reduce protection rather than add to it. The discharge provision seems to be in contradiction to the intent of the legislation.

While members of the Guard and Reserve were probably inconvenienced in some instances by the necessity of shifting from their employer sponsored health care plans to CHAMPUS, the association is not aware of Reservists who were unable to satisfy family health care needs through the authorized CHAMPUS program. Having noted that we are not aware of a problem, we would not fault the provision in S. 1095 that would give a Reservist the option of continuing his employer provided health insurance at his own expense.

Finally, we note that S. 1095 would provide an outreach program to provide employers and employees with accurate information regarding their rights. The National Committee for Employer Support of the Guard and Reserve has as its goal the development and promotion of public understanding of the National Guard and Reserve, and it is very helpful in resolving many of the reemployment questions which arise. In spite of the Committee's outstanding contributions, the DESERT SHIELD/DESERT STORM experience would suggest that more could be done to further the awareness of reemployment rights. The outreach program could contribute greatly to this needed awareness.

Thank you for the opportunity to present ROA's views on Veterans' Reemployment Rights legislation and the proposed changes thereto. The committee is to be commended for its efforts to restore educational assistance and to clarify and strengthen employment protections for members of the Reserve components. I will now be happy to respond to any questions that you might have.

SERVING
WITH
PRIDE

AMVETS

NATIONAL
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May 30, 1991

The Honorable Alan Cranston
Chairman, United States Senate
Committee on Veterans Affairs
414 Russell Senate Office Building
Washington, DC 20510-6375

Dear Senator Cranston;

Upon review of S. 1095 and H.R. 1578, I would like to return to you AMVETS' preferences of some of the main provisions of both.

Scope: (Support provision of H.R. 1578) While members of NOAA or the Merchant Marines were certainly not in the highest risk services during the Persian Gulf War (particularly in the case of the Merchant Marines -- we don't have much of a Merchant Marine anymore), we do support their inclusion in this legislation. In future wars specialties which can be provided by organizations such as NOAA might very well be crucial to U.S. military success.

Temporary Positions: (Support S. 1095) AMVETS has no objection to excluding temporary employees from this legislation.

Return to Work: (Support S. 1095) We consider the "Return to Work" provisions of the Senate bill to be somewhat more flexible to the military member.

Return to Work After Disability: (Support H.R. 1578) The obvious clause in the House legislation that compels AMVETS to support it is "..the minimum time required to accommodate the circumstances beyond the individual's control." There are cases in which rehabilitation can take longer than two years, and in these rare cases we feel that it is not unreasonable to reserve an injured or disabled veteran's job.

Documentation Upon Return: (Support H.R. 1578)

Continuation of Insurance Coverage: (Support S. 1095) The Senate provision puts a cap of the maximum of what a premium could cost.

Retention: (Support H.R. 1578) The House bill allows a greater time period of protection.

Enforcement -- Federal Government Employees: (Support S. 1095)

Enforcement -- State and Private Employees: (Support S. 1095)

Subpoenas: (Support S. 1095) We greatly favor inclusion of federal employees in this legislation.

Regulations: (Support H.R. 1578) We feel that the House legislation is more extensive in its coverage.

Outreach Program: (Support S. 1095) Few programs as complex as VRR are useful unless those eligible ate educated, etc.

Please accept our sincere appreciation for requesting our views on these two pieces of legislation. I hope our somewhat abbreviated response is useful to the Committee as they go forward with this legislation.

Sincerely,

Jonathan Gaffney
National Legislative Director

ASSOCIATION OF THE UNITED STATES ARMY

2425 WILSON BOULEVARD, ARLINGTON, VIRGINIA 22201-3385 (703)841-4300

6 June 1991

The Honorable Alan Cranston
Chairman, Committee on Veterans' Affairs
414 Senate Russell Office Bldg.
Washington, DC 20510-6375

Dear Senator Cranston:

Reference your letter dated May 29, 1991, asking the Association of the United States Army (AUSA) to comment on the substantive differences between H.R. 1578 and S. 1095, the two veterans' reemployment rights bills.

Upon review of the two bills, AUSA endorses the following sections:

a. SCOPE: The House bill is preferred because it provides for unforeseen contingencies which might require conferring reemployment rights upon those serving in the National Oceanic and Atmospheric Administration (NOAA) and the Merchant Marine. We agree that the Secretary of Defense should ask that these persons be covered by reemployment rights when the President has called them to duty in time of war or national emergency.

b. TEMPORARY POSITIONS: AUSA recommends that the House bill be followed since it excludes temporary positions from reemployment rights. This agrees with our position concerning rights of permanent employees as contrasted with those serving in a temporary classification.

c. RETURN TO WORK: The Senate bill language is preferred because it follows closely with present law requiring an application for reemployment. An application for reemployment ensures compliance in the reemployment process by both the employee and the employer.

d. RETURN TO WORK AFTER DISABILITY: AUSA supports the Senate requirement for a blanket two years extension for those hospitalized or convalescing from illness or injury incurred in or aggravated by service. One period of extension is much easier for the veteran to understand and makes it clear to all concerned in the reemployment process.

e. CONTINUATION OF INSURANCE COVERAGE: Our Association supports the Senate bill which sets the individual's premium payment at no more than 102%. This is a fair and equitable method of treatment for both employee and employer and does not transfer costs to others participating in a group health plan.

f. ENFORCEMENT -- FEDERAL GOVERNMENT EMPLOYEES: AUSA supports the Senate bill because it provides more protection and counsel for federal government employees throughout the claim process.

g. SUBPOENAS: We support the Senate bill because of its treatment of federal employees on the same basis as all other employees. Federal employees should be accorded the same protections as those employed by state, local or private employers when seeking compliance of witnesses.

h. OUTREACH PROGRAM: The Senate bill would provide a necessary service to our veterans seeking reemployment rights information. The Association supports this important contribution to the VA outreach program.

Thank you for the opportunity to comment on this important veterans' reemployment rights legislation.

Sincerely,

ERIK G. JOHNSON, JR.
Colonel, USA Retired
Director of Legislative Affairs

Central Intelligence Agency

Washington, D.C. 20505

June 11, 1991

The Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is to present the Administration's request that the enclosed subsection be added to S. 1095, the proposed "Uniformed Services Employment and Reemployment Rights Act of 1991." In addition to addressing other concerns raised by the Departments of Labor and Justice and the Office of Personnel Management in their recent testimony, the Administration requests that the Committee consider an issue of particular concern to certain Intelligence Community (IC) agencies, i.e., the CIA, the FBI, the National Security Agency (NSA), and Defense Intelligence Agency (DIA), and that appropriate changes in the bill be made.

The CIA and other IC agencies are generally supportive of congressional efforts in the area of veterans' reemployment rights, but we believe that S. 1095 could be read to have serious, unintended consequences with respect to employment matters in the national security context. The IC agencies do not discriminate against veterans/reservists and frequently hire individuals with military experience because such background often serves the needs of the IC. In fact, if the recent experience of Desert Storm is any indication, IC agencies sometimes confer benefits upon returning reservists beyond those that would be mandated by the proposed legislation.

However, S. 1095 provides for enforcement of the statute with respect to Federal agencies by the Merit Systems Protection Board with the assistance of the Office of The Special Counsel, the Department of Labor, and the Office of Personnel Management. While the IC agencies concur that enactment of the substantive provisions of S. 1095 will be beneficial to veterans and reservists, we must object to the procedural rights the legislation could be read to create vis a vis the IC agencies. S. 1095's enforcement provisions are inconsistent with the current legal framework, which protects

The Honorable Alan Cranston

from outside review the hiring and firing decisions in the national security context and existing IC agency personnel practices and procedures in national security matters. These proposed enforcement mechanisms therefore pose CIA and the other IC agencies significant national security concerns.

We urge that the enclosed provision be incorporated into S. 1095 in order to address the national security concerns of the IC agencies. The proposed provision continues to protect the reemployment rights of these Federal employees. The FBI, NSA, and DIA, as well as the NSC, the Department of Defense, and the Department of Justice all have been supportive of CIA's efforts in developing this proposal, and the Department of Labor assisted in drafting the proposed statutory language. If your staff wishes further information on this proposal, please have them contact Vicki Pepper, an attorney on my staff, at (703) 482-6126. A similar letter is being sent to the Ranking Minority Member.

The Office of Management and Budget advises that there is no objection to the presentation of this amendment to Congress from the standpoint of the Administration's program.

Sincerely,

William H. Webster
Director of Central Intelligence

Enclosure

Recommendation:

Proposed new subsection 4333A of S. 1095:

§ 4333A. Modified procedural rights with respect to certain federal employers.

(c) Notwithstanding any other provision of this chapter, sections 4324(a) and (b), 4332, 4333, and 4341 shall not apply to an agency of the Executive branch that is listed in section 2302(a)(2)(C)(ii) of title 5 of the United States Code and that therefore is not an agency within the meaning of section 2302 of title 5 of the United States Code. Nothing in this subsection shall be construed, however, to relieve any such agency from compliance with the substantive provisions of this chapter. Nothing in this subsection is intended to prohibit employees of such agencies from seeking information from the Department of Labor regarding any matter under this chapter or assistance in requesting reemployment or alternative employment. If an employee of an agency that is listed in section 2302(a)(2)(C)(ii) of title 5 of the United States Code is not reemployed and can qualify for an alternative position in another part of the Executive Branch, such person may apply to the Director of the Office of Personnel Management. Unless the Director has evidence of the unsuitability of such person for reemployment, the Director shall cause employment to be offered to such person by an agency other than one listed in section 2302(a)(2)(C)(ii) of title 5 of the United States Code in an alternative position that provides seniority, status, and pay equivalent to that of the position that such person would have attained if such person had been continuously employed during such person's period of service in the uniformed services. Finally, nothing in this subsection is intended to prohibit such agencies from voluntarily cooperating with the Department of Labor or Office of Personnel Management in any matter arising under this chapter.

Rationale:

S. 1095 could be interpreted to create a significant, unintended disruption of the existing procedural framework for handling hiring/firing decisions in the national security context. A situation could arise in which national security considerations make it necessary to terminate/not hire an individual who also is a veteran/returning reservist--for example, unexplained contacts with a foreign intelligence service could present counterintelligence concerns requiring termination of any employee. Under S. 1095, by simply alleging "veteran discrimination," a veteran/reservist arguably could call such decision into question.

Under current law, the Director of Central Intelligence has the authority to hire and fire employees of the CIA without outside review where breaches of national security may be involved. Other Intelligence Community agencies have similar authorities. See, e.g., section 102(c) of the National

Security Act, 50 U.S.C. § 403(c), and 5 U.S.C. §§ 2302 and 2305. It is important that the IC agencies maintain necessary flexibility in hiring/firing decisions made in the interest of national security. Moreover, external review of such claims would conflict with the statutory obligation of the Director of Central Intelligence (DCI) to protect intelligence sources and methods from unauthorized disclosure.

Notwithstanding the discretion of the DCI in hiring/firing decisions, a system of internal procedural safeguards is provided to CIA employees that would enable veterans/reservists to file grievances with the Agency, and an independent statutory Inspector General exists who could investigate allegations of violation of the statute. The other IC agencies have similar mechanisms in place. Therefore, the proposed section 4333A would not relieve CIA, NSA, FBI, DIA, or other intelligence/counterintelligence organizations designated by the President from any of the substantive obligations under the new legislation--it is intended only to relieve them from the law's external enforcement mechanisms, which would interfere with the existing framework for handling hiring/firing decisions in the national security context.

Moreover, under the proposed amendment, employees of the procedurally exempted agencies would be free to request information and assistance from the Department of Labor on matters arising under the new chapter. Such assistance by the Department of Labor could include contacting the employing agency to explain the Act and to request that the agency reconsider its decision not to reemploy the person requesting assistance if it appears to the Department of Labor that the individual may be eligible for reemployment under this Act. These agencies would cooperate voluntarily with the Department of Labor or the Office of Personnel Management (OPM), as appropriate, in matters arising under this chapter, if and to the extent that the agencies determined such cooperation could be provided consistent with national security interests. OPM would find alternative employment in an agency that is not part of the Intelligence Community for individuals who are not reemployed by the IC agency unless OPM has evidence that the individual is unsuitable for reemployment.

DEPARTMENT OF DEFENSE

UNITED STATES TRANSPORTATION COMMAND
SCOTT AIR FORCE BASE, ILLINOIS 62225-7001

22 June 1991

The Honorable Alan Cranston
Chairman, Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510-0501

Dear Mr Chairman

As your committee prepares to take up the Uniformed Services Employment and Reemployment Rights Act of 1991, S. 1095, I would like to convey our strong support for the inclusion of language granting reemployment rights to merchant mariners who volunteer to support our national defense.

The U.S. merchant marine, long considered the fourth arm of defense, has a distinguished history of support to the defense of our great nation. They have voluntarily sailed in every overseas deployment of U.S. combat power, from the Spanish-American War in 1898 through both World Wars, Korea, Vietnam, and now DESERT SHIELD/STORM. The role of the merchant marine in defense has been codified by the Merchant Marine Act of 1936 which established the requirement for a merchant marine capable of serving as a "military and naval auxiliary," and the U.S. merchant marine has risen to that challenge. In World War II more than 270,000 merchant mariners sailed in support of our national defense - 6,632 were killed and 609 taken prisoner of war. Our merchant mariners experienced a casualty rate only one-tenth of one percent lower than the Marine Corps, which experienced the highest casualty rate of any branch of the Armed Forces.

Unfortunately today our ability to rely on the merchant marine to meet national defense sealift requirements is eroding. The U.S. merchant fleet has declined rapidly over the past 20 years, from 588 militarily useful dry cargo ships in 1970 to only 168 in 1990. While it is possible to replace needed shipping capability through various acquisition means, we cannot so easily replace the experienced mariners this decline has displaced. All of the organic sealift assets which performed so well in Operation DESERT SHIELD/STORM; the Fast Sealift Ships, Afloat and Maritime Prepositioning Ships, and the Ready Reserve Force (RRF) are manned exclusively by civilian merchant mariners who volunteer for duty. By the late 1990s it is estimated our manning shortfall, in the event of full mobilization, will be 7000 to 8000 mariners.

Our recent experience in Operation DESERT SHIELD/STORM has validated our concerns over our ability to man organic sealift assets, the largest source of U.S. flagged, military unit equipment capable, shipping. Under the current program the Maritime Administration (MARAD) hires ship managers who are responsible for maintenance, activation, and crewing of RRF vessels. These ship managers work through the maritime labor unions to acquire manning from active mariners on union rolls. Unfortunately, even with only 80 percent of the reserve fleet activated incrementally over the 6 months of Operation DESERT SHIELD/STORM, ship managers and labor unions experienced crewing shortfalls. There simply are not enough active mariners sailing today to simultaneously meet both economic and defense needs. The impact of these crewing problems would have been greatly amplified if not for our ability to call on foreign flagged shipping to meet a portion of our deployment needs, and this shortfall will only be exacerbated as our reserve fleet grows over the next several years. We need to find a workable, cost effective way to bridge the widening gap between the manning required to sail our organic assets and the shrinking pool of active merchant mariners.

The United States Transportation Command (USTRANSCOM), MARAD, and the Navy are working together to find a straightforward solution to this growing manpower shortage. Our approach focuses on tapping into the pool of inactive mariners who have sailing experience but have elected to pursue other than sailing careers. Since these mariners now rely on other than active sailing jobs for their livelihood, reemployment rights similar to those enjoyed by the Guard and Reserves become critical to acquiring volunteers to support our national defense sealift needs.

The merchant mariner reemployment rights language submitted by the Administration and adopted by the House seeks a very narrowly defined privilege, to be utilized only during national emergency or war. While granting this privilege will have no impact on the budget nor any other veteran entitlement program, precluding merchant mariners from reemployment rights will force us to look to other, more costly proposals to ensure adequate merchant mariner manning is available to operate our current and future sealift assets.

I strongly urge you to intercede in this matter and ensure language granting reemployment rights for merchant mariners is included in S. 1095, the Uniformed Service Employment and Reemployment Rights Act of 1991. Your efforts can ensure we are able to pursue the most cost effective solution to our growing merchant mariner shortfall.

Sincerely

Hansford T Johnson

HANSFORD T. JOHNSON
General, USAF
Commander in Chief

cc: Members, Veterans' Affairs
Committee

U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

JUN 17 1991

The Honorable Alan Cranston
Chairman, Committee on
Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In recent testimony before your committee, we offered to provide the Administration's position on issues of concern raised by S. 1095, which would amend Title 38 of the United States Code with respect to employment and reemployment rights of veterans and other members of the uniformed services.

The bill would amend the veterans' reemployment rights (VRR) law (Sections 2021-2026 of Title 38, United States Code) to provide a basic reorganization of the VRR law, and to assure that returning servicemembers are protected in all aspects of their employment (except for pay and work performed) as if they had been continuously employed during such period of service.

We are pleased to have this opportunity to express our views regarding S. 1095, which has several substantive differences from the House-passed Uniformed Services Employment and Reemployment Rights Act of 1991 (USERRA), which the Administration substantially supports. The enclosures reflect the Administration's positions regarding S. 1095. In addition, we concur in the recommendations to amend S. 1095 presented by the Department of Justice in its testimony before your committee on May 23, 1991 concerning representation of Federal employees on appeal, and attorney fees. We look forward to working directly with your staff to remedy these differences so that the Administration can support your bill.

The Office of Management and Budget advises that there is no objection to the transmittal of this letter from the standpoint of the Administration's program.

Sincerely,

Lynn Martin

LYNN MARTIN

Enclosures

Coverage of "Regular" Military Service

Location: Section 4301(a)(1) of S. 1095.

Suggested Alternative Language:

Delete "nonregular and" from line 5, page 3 of S. 1095, or expand preamble in manner similar to Administration bill at section 2021.

Rationale for Suggested Alternative Language:

The existing reemployment statute applies to persons serving in the regular Armed Forces as well as the Reserve Components. We are concerned that the use of the term "nonregular," without more, could be construed to mean that the proposed statute does not apply to persons serving in the regular Armed Forces to the same extent, if at all, as those serving in the Reserve Components.

Liberal Construction Required

Location: Section 4301 of S. 1095.

Suggested Additional Language:

Add a new section 4301(c), as follows:

> (c) It is the sense of Congress that the provisions of this chapter should be liberally construed in favor of persons with entitlements under this chapter.

Source of Additional Language:

Section 2022(a) of the Administration's bill.

Rationale for Additional Language:

This language is intended to codify the statement of the Supreme Court that the VRR statute should be "liberally construed for the benefit of those who left private life to serve their country." Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 285 (1946). This has been a keystone of judicial interpretations of the statute and has served protected persons well. This language will help ensure the favorable outcome of litigation with respect to issues that have not been and cannot be specifically anticipated by the Congress.

Definition of "uniformed services" - Coverage of USERRA

Location: Section 4303(9) of S. 1095.

Suggested Alternative Language:

The term "uniformed services" means the United States Army, Navy, Air Force, Marine Corps, and Coast Guard, including the reserve components thereof as defined in section 101(27) of this title, the Army National Guard and Air National Guard when engaged in active duty for training as defined in section 101(22) of this title or in inactive duty training as defined in section 101(23) of this title, the commissioned corps of the National Oceanic and Atmospheric Administration, the commissioned corps of the Public Health Service, the Merchant Marine during time of war, national emergency, or when deemed necessary by the Secretary of Defense in the interest of national defense, and any other category of persons so designated by the President in time of war or national emergency.

Source of Alternative Language: Section 2023(11) of the Administration's bill.

Differences Between the Suggested Alternative Language and S. 1095:

a. S. 1095 applies to the five Armed Forces (Army, Navy, Air Force, Marine Corps, and Coast Guard) as well as the commissioned corps of the Public Health Service (PHS). The suggested language would make the law apply to all of those entities plus the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA).

b. The suggested language would make the law apply as well to the Merchant Marine during time of war or national emergency or "when deemed necessary by the Secretary of Defense in the interest of national defense."

c. The suggested language would give the President the authority to designate any other category of persons a "uniformed service" and thus accord such persons rights under this law. This Presidential authority only applies "in time of war or national emergency."

Rationale for Alternative Language:

a. The NOAA commissioned corps is a uniformed service. Members of that corps perform service which is just as deserving of reemployment protection as the service performed by members of other uniformed services. In addition, they receive some other benefits provided to military service members. This is not a major burden on employers because there are only approximately 400 members of that corps and most of them are recruited directly out of college and have no civilian jobs to which to return.

b. Especially in times of emergency, the Merchant Marine performs an essential function for national defense. Personnel can be transported by air, but military cargo must be transported by ship. During the build-up for Operation Desert Storm, it was necessary to recruit experienced mariners from other lines of work to operate the vessels carrying military cargo to the Persian Gulf region. Under current law, those persons do not have reemployment rights. The Department of Defense and the Department of Transportation (Maritime Administration) have informed us that according reemployment rights to such persons in such situations will help ensure their availability if they are needed again.

c. During World War II, particularly, certain categories of persons (e.g., Women's Air Service Pilots) who were considered civilians at the time performed important, arduous, and sometimes dangerous service that should be recognized in law. The proposed language will give the President the authority to respond to these circumstances as they arise without having to ask Congress for special legislation.

Only Persons Holding "Other Than Temporary" Civilian Jobs Should Have Reemployment Rights

Location: Section 4322 of S. 1095.

Suggested Alternative Language:

Delete "a" from section 4322(a) at page 9, line 14.

Add: "an other than temporary" in its place.

Source of Alternative Language:

Administration bill, section 2025(a). Existing reemployment statute, 38 U.S.C. § 2021(a).

Rationale for Alternative Language:

Since 1940, the Veterans' Reemployment Rights (VRR) law has given rights to "any person . . . who leaves a position (other than a temporary position) in the employ of any employer in order to perform . . . training or service [in the Armed Forces]." 38 U.S.C. § 2021(a) (emphasis supplied).

In its first case under the VRR law, the Supreme Court emphasized that, "This legislation is to be liberally construed for the benefit of those who left private life to serve their country." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). This liberal construction also has been applied to the requirement that the veteran's preservice job have been "other than temporary." For example, the U.S. Court of Appeals for the Sixth Circuit recognized that a position was "other than temporary" where the veteran had a reasonable expectation, prior to military service, of continuing to work several more years but not necessarily for an indefinite duration. *See* *Stevens* v. *Tennessee Valley Authority*, 687 F.2d 158, 160-61 (6th Cir. 1982).

It also has been held that a probationary job is not "temporary" for purposes of the VRR law. *See* *Collins* v. *Weirton Steel Co.*, 398 F.2d 305 (4th Cir. 1968). Even a seasonal job can be "other than temporary" if the veteran had a reasonable expectation, prior to military service, that job would recur at the next season. *See* *United States* v. *Wimbish*, 154 F.2d 773 (4th Cir. 1946); *United States* v. *North American Creameries, Inc.*, 70 F. Supp. 36 (D.N.D. 1947). Recently the U.S. Court of Appeals for the Ninth Circuit upheld the VRR rights of a construction industry laborer working a short-term job assignment at the time of his entry into military service, holding that he held an "other than temporary" employment relationship with the industry as a whole and the hiring hall. *See* *Imel* v. *Laborers' Pension Trust Fund for Northern California*, 904 F.2d 1327, 1334 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 343 (1990).

In summary, the requirement of an "other than temporary" preservice position has not been a major impediment for service members. Changes to the reemployment statute should be made only with good reason. At least in this respect, the language of the current law has served members of the uniformed services well and need not be changed.

Impossible or Unreasonable to Notify an Employer Prior to Service

Location: Section 4322(b) of S. 1095.

Suggested Alternative Language:

Delete sentence starting with "A determination. . ." beginning on line 10 page 10.

Substitute:

> Whether military necessity precluded notification will be determined by the concerned uniformed service authority and shall not be subject to judicial review.

Source of Alternative Language: Section 2027(d)(2) of the Administration's bill.

Differences Between Suggested Alternative Language and S. 1095:

The language of S. 1095 implies that "the Secretary concerned" (e.g., the Secretary of the Army) will make the "impossible or unreasonable" determination regardless of the reason prior notice is asserted to have been impossible or unreasonable. Under the suggested alternative language, the "concerned uniformed service authority" will make this determination only if "military necessity" is the asserted basis for the "impossible or unreasonable" determination.

Rationale for Suggested Alternative Language:

a. The determination that prior notice is precluded by military necessity is likely to be made by an officer of the "concerned uniformed service" to which a member is being recalled to active duty on short notice. We are concerned that the language of S. 1095 may invite litigation as to whether the "Secretary concerned" had properly delegated authority to such officer.

b. Military necessity is only one possible basis for a finding that providing prior notice was impossible or unreasonable. The unavailability or failure of the telephone system could be another possible reason. If military necessity is the basis for the determination, such a decision should be made by the member's commanding officer or other proper military authorities and should not be subject to judicial review. If some other basis is asserted, such a determination should be made by the court or by the Merit Systems Protection Board (for Federal employee cases).

Adequacy of Documentation - Who Determines?

Location: Section 4322(e)(2) of S. 1095.

Suggested Alternative Language:

Substitute "of Labor" for "concerned" in line 3 of page 15.

Rationale for Suggested Alternative Language:

The language of S. 1095 seems to imply that each service secretary (e.g., the Secretary of the Navy) will be issuing regulations specifying the kind of documentation that will be sufficient to secure timely reemployment. A multiplicity of perhaps conflicting regulations could be confusing for employers and the courts. We suggest that, consistent with the Administration bill, the regulations be promulgated by the Secretary of Labor and, insofar as possible, should be uniform for all seven uniformed services.

Reemploy First, Then Obtain Documentation

Location: Section 4322(e)(3) of S. 1095

Suggested Alternative Language:

Section 4322(e)(3) of S. 1095, substitute the following:

> If the employer is not satisfied with the documentation that the applicant has provided, the employer may make further inquiries after reinstating the applicant. If as a result of such further inquiries by the employer it is established that the employee does not meet one or more of the eligibility criteria, such employee's employment and rights and benefits under this chapter may be terminated.

Rationale for Alternative Language

This language from the Administration's bill states more explicitly that the employer's duty is first to reinstate the employee and only thereafter to investigate in the event documentation is lacking. Timely reinstatement is an essential need of those returning, and the reemployment statute, while giving consideration to an employer's interest, should give an employer little basis to delay or attempt to defeat the obligation to reinstate promptly.

Person Returning from Short Tour Should Be Entitled to Return to Exact Position

Location: Section 4323(a)(1) of S. 1095.

Suggested Alternative Language:

(1) In the case of a person who is not disabled, a person returning from service in the uniformed services as provided in section 4322 of this chapter shall ---

(A) if such person's period of service was fewer than 181 days and such person is still qualified to be employed in the position which such person left for service in the uniformed services, be employed in the same position, within time limits to be established by the Secretary in regulations to be promulgated pursuant to section 4351 of this chapter;

(B) if such person's period of service was 181 days or more and such person is still qualified to be employed in the position which such person left for service in the uniformed service, be employed within time limits to be established by the Secretary in regulations to be promulgated pursuant to section 4351 of this chapter, in the same position or in a position of like seniority, status, and pay;

Source of Alternative Language:

Section 2026(a)(1)-(2) of the Administration's bill.

Rationale for Suggested Alternative Language:

Under section 4323(a)(1) of S. 1095, an employer is given the option to reemploy the returnee in the same position or in a similar one. Under the Administration's bill and H.R. 1578, persons returning from short tours (up to 180 days) of training or service are entitled to return to their exact jobs, with the perquisites of seniority that they would have received if continuously employed. This is consistent with the current reemployment statute's treatment of active duty for training or inactive duty training. See 38 U.S.C. § 2024(d). While an employer needs flexibility in reemploying employees returning from long tours, no such need applies in the case of short tours. A reservist should not have to be concerned about moves from his or her civilian job each time he or she performs two days of inactive duty training.

Accrual of Vacation and Other Short-term Benefits during Short Tours of Service

Location: Section 4325(a) of S. 1095.

Suggested Additional Language:

Add a second sentence to Section 4325(a) of S. 1095, as follows:

> If the person's absence for service in the uniformed services was for a period of fewer than 31 days, the person shall be entitled to all benefits (other than the accrual of annual or sick leave in the case of a person eligible to receive military leave under section 6323 of title 5, United States Code), whether or not related to seniority, but not including pay for work not performed, as if the person's employment had not been interrupted by service in the uniformed services.

Source of Additional Language:

Section 2027(a)(1) of the Administration's bill.

Rationale for Additional Language:

The purpose of this additional language is to ensure that persons serving short terms of military training or service (up to 30 days) will continue to accrue vacation or annual leave during those tours and that they otherwise will be treated as if continuously employed for all purposes, except that employers are not required to pay them for work they have not performed. This concept was included in Section 2027(a)(1) of the Administration's bill but was perhaps inadvertently omitted from S. 1095 and H.R. 1578.

Persons serving in military service earn leave from the military at the rate of 2 1/2 days per month, but not for tours of fewer than 30 consecutive days. See 10 U.S.C. § 701(a). A Reserve Component member should not forfeit a part of his or her annual vacation simply because he or she performed annual military training during the year. The suggested additional language will avoid such an unjust result and will otherwise ensure that such a member be treated as if continuously employed.

The parenthetical clause of the suggested additional language exempts the Federal Government, as an employer, from this requirement because the Federal Government already provides very generous benefits, including 15 days of paid military leave, for its employees who are Reserve Component members. See 5 U.S.C. § 6323. This clause would also protect the Federal government from being required to credit annual or sick leave during repeated short tours, thus keeping this section budget neutral.

Amount of Premium Required for the Continuation of Civilian Health Insurance Coverage

Location: Section 4325(c)(1) of S. 1095.

Suggested Alternative Language:

Redesignate paragraph (2) of section 4325(c) of S. 1095 as paragraph (3).

Amend section 4325(c), relating to retention of employer-provided insurance during absences for uniformed service, to insert the following paragraphs (1) and (2) in lieu of paragraph (1).

(c)(1) A person whose civilian employment with an employer is interrupted by a period of service in the uniformed services shall, if such person requests with respect to the period, retain existing coverage under any insurance policy or program provided by such employer for its employees in accordance with conditions generally applicable to employee participation during a furlough or leave of absence and the provisions of this subsection.

(2) On the date that a person's employer-provided insurance coverage would otherwise terminate due to an extended absence from employment for purposes of performing service in the uniformed services, the employer shall give such person an opportunity to elect to continue temporarily insurance coverage acquired through civilian employment in accordance with this paragraph so that such insurance continues for a minimum of 18 months after such date. Such temporary continuation of employer-provided insurance shall be in lieu of, to the extent it would duplicate, any insurance the person is entitled to elect pursuant to section 4980B of the Internal Revenue Code of 1986, section 8905a of title 5, United States Code, or other similar law of the United States or any State. A person who elects to continue temporarily insurance coverage under this paragraph may be required to pay not more than 102 percent of the full premium associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for periods of fewer than 31 consecutive days, such person may not be required to pay more than the employee share, if any, for any such coverage.

Rationale for Alternative Language:

S. 1095 would entitle any person whose civilian employment is interrupted by active military service to request continuation of all employer-provided insurance plans during such absence for at least 18 months after commencement of such service. In this regard, the employee could be required to pay no more than 102 percent of any premium required of other employees, or to pay the same required of other insured employees when military service is less than 31 days. H.R. 1578 would provide a similar 18-month continuation of insurance for absent reservists but would allow employers to charge such employees the full cost associated with benefit continuation (consistent with current laws on temporary continuation of health insurance on termination of private employment, 26 U.S.C. 4980B, and Federal employment, 5 U.S.C. 8905a).

We are concerned with the language of S. 1095 stating that a person in the service who requests insurance coverage "may be required to pay not more than 102 percent of any premium required of other employees for the continuation of any insurance coverage . . . ." This language is susceptible to an interpretation that the employee serving in military service would only be required to pay 102% of the premium paid by other current employees. If S. 1095 were to be enacted in its present form, and if such an interpretation were to be adopted, significant new costs would be imposed upon employers, including the Federal Government. Under the "pay as you go" requirement of the most recent Omnibus Budget Reconciliation Act, it would then be necessary for the Congress to enact corresponding savings or revenue enhancements to make up for this new Federal cost. The alternative language, adopted from the Administration bill, would clarify that an employer is not required to finance the continuation of health insurance coverage for up to 18 months and would make S. 1095 budget-neutral. Any provision which fails to ensure that an employee may be required to pay the cost of the insurance premium is problematic.

Currently, Federal employees are entitled to continue Federal Employee Health Benefits (FEHB) and Federal Employee Group Life Insurance (FEGLI) coverages for up to 12 months in a leave without pay (LWOP) status. While no FEGLI contributions are required for continued coverage during LWOP, employees normally must continue the employee share of FEHB premiums. [However, OPM exercised its regulatory discretion and waived FEHB contributions while employees are in LWOP status for military service related to the Persian Gulf conflict.] If LWOP status continues beyond 12 months, both FEHB and FEGLI terminate subject to a 31-day temporary extension at no cost during which the employee may exercise the right to convert to nongroup insurance coverage without providing medical evidence of insurability. Alternatively, insured employees who separate from civilian service may elect to continue temporarily regular FEHB coverage for up to 18 months after the separation, but in such case the employee must pay both the Government and the employee shares of premiums, plus an extra 2 percent of premium to cover related administrative expenses. Temporary continuation of coverage begins on the day after the 31-day temporary extension of coverage expires.

S. 1095 as introduced would require continuation of Federal employees' health and life insurance with Government contribution for 18 months in lieu of the 12 months currently available to employees on leave without pay. The proposed amendment would require employers, on the date insurance would otherwise terminate, to offer employees at least an 18-month temporary continuation of existing insurance on an employee-pay-all basis, in lieu of any duplicative temporary coverage available under other laws.

Accrual of Annual Leave or Vacation During Military Service or Training

Location: Section 4325(e)(2) of S. 1095.

Suggested Alternative Language:

Delete paragraph (2) of section 4325(e) and renumber paragraph (3) as paragraph (2).

Rationale for Suggested Alternative Language:

Without the suggested deletion, this subsection is susceptible to an interpretation that an employer is required to allow an employee to continue accruing vacation or annual leave benefits while the employee is in military service or training. The Supreme Court has held that, under the existing reemployment statute, vacation or annual leave days are not perquisites of seniority which a returning veteran is entitled to claim under the "escalator principle." See Foster v. Dravo Corp., 420 U.S. 92 (1975).

Overruling Foster would impose substantial new costs upon employers, including the Federal Government. Like the provision for health insurance, this provision could impose new costs upon the Federal Government for which the Congress would be required to find corresponding savings or revenue enhancements elsewhere. The deletion of section 4325(e)(2) would make S. 1095 budget-neutral.

It should also be noted that persons in military service earn leave from the military, except for tours of fewer than 30 consecutive days, and, except during wartime, are allowed to use that leave during or at the end of their active military service. The suggested additional language for section 4325(a), supra, will allow Reserve Component members to accrue vacation during tours of up to 30 consecutive days.

If this section of S. 1095 is intended only to allow an employee to use, during military service, annual leave or vacation which had already been accrued, not to continue accruing such benefits while in service, this intent is adequately expressed by section 4325(e)(1), which is consistent with current treatment of Federal employees, thus making section 4325(e)(2) unnecessary.

If this section of S. 1095 is intended to require the employer to grant annual leave or vacation similar to that granted to other employees on other forms of leave, this intent is adequately expressed in section 4325(b), thus again making section 4325(e)(2) unnecessary.

Period of Special Protection Against Discharge

Location: Section 4325(d) of S. 1095.

Suggested Alternative Language:

Delete subsection (d) of section 4325 and replace it with the following language:

> A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause-
>
> (1) if such person's period of service in the uniformed services was 181 days or more, within one year;
>
> (2) if such person's period of service in the uniformed services days or more but less than 181 days, within six months; or
>
> (3) if such person's period of service in the uniformed services was less than 31 days, within a period of time that is equal to the period of service concerned.

Source:

Section 2034(e) of H.R. 1578; see also Section 2027(e) of the Administration's bill.

Rationale for Alternative Language

Under Section 4325(d), the duration of the period of special protection would depend upon the duration of the returnee's prior employment by that employer, including the period or periods of military training or service that may have interrupted that employment.

Under the existing reemployment statute, the duration of the special protection against discharge except for cause depends upon the category of military duty or training. The protection has two purposes: (1) to give the returning veteran a reasonable time to regain civilian skills; and (2) to protect the veteran from a bad faith reinstatement.

Under the Administration's bill and H.R. 1578, the duration of the period of special protection would depend upon the duration of the military service or training. Without the suggested change, the provisions of section 4325(d) would expand the protection against layoff well beyond that provided by current law or proposed by the Administration (section 2027(e)). The Administration proposal relates this special protection to the length of absence from the job which is reasonable in light of the intent of the special protection. To relate the period of special protection to the length of time the individual has been in the employ of the employer is essentially irrevelant to the purpose of the special protection and is not warranted.

Employee Contributions to Individual Account Plans

Location:

Section 4326 of S. 1095

Suggested Alternative Language:

Insert on page 26, at line 15, of S. 1095, new paragraph (b)(3) as follows:

> (3) A person reemployed under this chapter shall be entitled to accrued benefits that are derived from employee contributions in an individual account plan as defined in section 3(34) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002(34), only to the extent the person makes payment to the plan in respect of such contributions. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of deemed service described in section (a)(2)(B). However, nothing in this paragraph shall impose any liability on the employer or the plan to make any matching or other contributions, or to make any allocation from other participants' accounts, to any account of a person reemployed under this chapter.

Source of Suggested Alternative Language:

This is language parallel to Section 2027(g)(2) of the Administration's Bill.

Rationale for Suggested Alternative Language:

In the case of individual account plans or defined contribution plans, reemployed veterans could make "catch-up" employee contributions to such plans. Because employer contributions to individual account plans are more properly characterized as current compensation than as perquisites of seniority, employers would have no obligation to make any matching or other contributions to such plans and the plans would not be required to reallocate money that has previously been allocated to other participants' accounts.

Any provision permitting "catch-up" employee contributions to individual account plans may require conforming amendments to the Internal Revenue Code.

Entitlement to Accrued Benefits

Location:

Section 4326 of S. 1095

Suggested Alternative Language:

On page 25, line 15, of S. 1095, delete the words "and for" and delete lines 16 and 17. On line 15, after the word "benefits" insert the following:

> ", provided: That such person meets the eligibility criteria under this chapter and the regulations promulgated under Section 4351 of this chapter; and, provided further, that: Any such deemed service shall be taken into account in determining his or her right to accrue benefits under the plan only in the case of a defined benefit plan as defined in section 3(35) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002(35), or under a similar Federal or State law governing pension benefits for governmental employees.

Source of Suggested Alternative Language:

Sections 2027(f)(2) and (g)(2) of the Administration's Bill

Rationale for Suggested Alternative Language:

The insert would make clear that military service would be credited as service with the employer for purposes of determining accrued benefits only in the case of defined benefit plans. The Administration bill excepts defined contribution or individual account plans from the obligation to provide benefit accruals because such accruals represent contributions actually made to the plan participants' individual accounts, and are more properly characterized as current compensation than as perquisites of seniority.

Application of Law to Federal Retirement Systems

Location: Section 4326(b)(2) of S. 1095.

Suggested Alternative Language:

Section 4326(b)(2) of S. 1095 should be rewritten as follows:

> (2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a)(2)(B) that are derived from employee contributions only to the extent the person makes payment to the plan with respect to such contributions. No such payment (except payments required by sections 8332(c) or 8411(c) of title 5, United States Code) may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of deemed service described in subsection (a)(2)(B)).

(Emphasis supplied.)

Difference Between Suggested Alternative Language and S. 1095

The suggested alternative language (highlighted parenthetical clause) would exempt the Federal retirement systems from the general provision regarding employee contributions upon returning from military service, and also limit the costs involved with such contributions.

Rationale for Suggested Alternative Language:

The Federal civilian retirement systems already give generous credit for military service, not only for persons whose Federal civil service careers are interrupted by military service but also for persons whose military service preceded their initial Federal civilian employment. As is the case regarding civilian health insurance coverage and the accrual of annual leave, discussed supra, S. 1095, without the suggested amendment, could impose substantial new costs upon the Federal Government as an employer, and under the Omnibus Budget Reconciliation Act the Congress would be required to propose corresponding savings or revenue enhancements elsewhere to make up for this new cost.

Without the suggested changes, in cases of civilian Federal employees, most of whom are under either the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS), this subsection would exempt military service which interrupts Federal civilian employment from the usual military deposit requirements in the retirement laws. Instead of being required to deposit the prescribed percentage of military base pay (3 percent for FERS or 7 percent for CSRS) as required by title 5, United States Code, FERS participants and certain CSRS participants who have concurrent social security coverage (CSRS-offset employees) would be required to pay only an amount equal to 0.8 percent of the basic pay of their civilian positions, as is normally contributed by active employees with these retirement coverages. Employees covered by CSRS alone would continue to pay a deposit based on 7 percent of military base pay under S. 1095, since regular CSRS contributions are 7 percent of civilian base pay.

S. 1095 would not affect deposit rates for purposes of crediting military service performed before civilian Federal service commences, so an individual with several periods of military service, before and during civilian service or before and after S. 1095 becomes effective, would pay different deposit rates. These inconsistencies would likely lead to pressures for uniformly lowering all deposit rates for military service credit. To the extent that employees contribute less toward funding retirement benefits, Government costs under Federal retirement systems will increase.

The suggested alternative language would exempt Federal retirement systems from the deposit limitation in section 4326(b)(2). Unlike the retirement programs of private employers, Federal defined-benefit retirement programs routinely allow credit for military service, and already meet the need to provide a comprehensive retirement benefit package to the employee whose employment career includes a mix of civilian and military service.

Enforcement Procedures for Intelligence Community Agencies

Recommendation:

Proposed new subsection on 4333(f) of S. 1095:

§ 4333 * * *

(f) Notwithstanding any other provision of this chapter, this section and section 4341 shall not apply to an agency of the Executive Branch that is listed in section 2302(a)(2)(C)(ii) of title 5 of the United States Code and that therefore is not an agency within the meaning of section 2302 of title 5 of the U.S. Code. Nothing in this subsection shall be construed, however, to relieve any such agency from compliance with the substantive provisions of this chapter. Nothing in this subsection is intended to prohibit employees of such agencies from seeking information from the Department of Labor regarding any matter under this chapter or assistance in requesting reemployment or alternative employment. If an employee of an agency that is listed in section 2302(a)(2)(C)(ii) of title 5 of the United States Code is not reemployed and can qualify for an alternative position in another part of the Executive Branch, such person may apply to the Director of the Office of Personnel Management. Unless the Director has evidence of the unsuitability of such person for reemployment, the Director shall cause employment to be offered to such person by an agency other than one listed in section 2302(a)(2)(C)(ii) of title 5 of the United States Code in an alternative position that provides seniority, status, and pay equivalent to that of the position that such person would have attained if such person had been continuously employed during such person's period of service in the uniformed services. Finally, nothing in this subsection is intended to prohibit such agencies from voluntarily cooperating with the Department of Labor or Office of Personnel Management in any matter arising under this chapter.

Rationale:

S. 1095, like H.R. 1578, could be interpreted to create a significant, unintended disruption of the existing procedural framework for handling hiring/firing decisions in the national security context. A situation could arise in which national security considerations made it necessary to terminate/not hire an individual who also is a veteran/returning reservist. For example, unexplained contacts with a foreign intelligence service could present counterintelligence concerns requiring termination of an employee. Under S. 1095 or H.R. 1578, by simply alleging "veteran discrimination," a veteran/reservist arguably could call such decision into question.

Under current law, the Director of Central Intelligence and has the authority to hire and fire employees of the CIA without outside review where breaches of national security may be involved. Other Intelligence Community (IC) agencies have similar authorities. See, e.g., section 102(c) of the National Security Act, 50 U.S.C. § 403(c) and 5 U.S.C. §§ 2302 and 2305. It is important that the IC agencies maintain necessary flexibility in hiring/firing decisions made in the interest of national security. Moreover, external review of such claims would conflict with the statutory obligation of the Director of Central Intelligence (DCI) to protect intelligence sources and methods from unauthorized disclosure.

Notwithstanding the discretion of the DCI in hiring/firing decisions, a system of internal procedural safeguards is provided to CIA employees that would enable veterans/reservists to file grievances with the Agency, and an independent statutory Inspector General exists who could investigate allegations of violation of the statute. The other IC agencies have similar mechanisms in place. Therefore, the proposed subsection (f) would not relieve CIA, NSA, FBI, DIA, or other intelligence/counterintelligence organizations designated by the President from any of the substantive obligations under the new legislation. Subsection (f) is intended only to relieve those organizations from the law's external enforcement mechanisms, which would interfere with the existing framework for handling hiring/firing decisions in the national security context.

Moreover, under the proposed amendment, employees of the procedurally exempted agencies would be free to request information and assistance from the Department of Labor on matters arising under the new chapter. Such assistance by the Department of Labor could include contacting the employing agency to explain the Act and to request that the agency reconsider its decision not to reemploy the person requesting assistance if it appears to the Department of Labor that the individual may be eligible for reemployment under this Act. These agencies would cooperate voluntarily with the Department of Labor or the Office of Personnel Management (OPM), as appropriate, in matters arising under this chapter, if and to the extent that the agencies determined such cooperation could be provided consistent with national security interests. OPM would find alternative employment in an agency that is not part of the Intelligence Community for individuals who are not reemployed by the IC agency unless OPM has evidence that the individual is unsuitable for reemployment.

Definition of "Veteran"

Location: S. 1095, section 2(d)(2)(A).

Suggested Alternative Language:

Delete this subsection.

Rationale for Suggested Alternative Language:

Many persons who can rightfully claim benefits under S. 1095 do not qualify as "veterans" under this definition. Any use of the term "veteran" should be deleted and substituted with "member of the uniformed services."

U.S. Department
of Transportation
**Maritime
Administration**

Administrator

400 Seventh Street, S.W.
Washington, D.C. 20590

11 JUN 1991

The Honorable Alan Cranston
Chairman, Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to urge that the Administration's proposal to provide reemployment rights for United States merchant mariners be included in the bill, S. 1095, to amend title 38, United States Code, "to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services." The House-passed bill, H.R. 1578, includes the "merchant marine" in the definition of "uniformed services."

During Operation Desert Shield/Storm merchant mariners performed a vital role in manning the Ready Reserve Force (RRF) ships and the U.S. Navy's Fast Sealift Ships and prepositioned ships in the military sealift effort to supply the Armed Forces during the Persian Gulf crisis. Many individuals were drawn from active or retired seafaring personnel. Nearly 80 percent of total sealift cargoes were carried by U.S.-flag ships with civilian crews.

Delays occurred in fulfilling the manning requirements for the ships because a sufficient number of active qualified seagoing personnel was not immediately available. Despite their qualifications to do so, many potential mariners working in shoreside jobs were unable to fill these jobs because there was no guarantee that their private sector employment would be available upon their return. Those who volunteered still man the RRF ships that remain in operations status to assist in the return of large vehicles, tanks, and equipment from the Middle East.

At Congressional hearings this year, the U.S. Transportation Command (TRANSCOM) of the Department of Defense and the U.S. Navy have supported the Administration's proposal to extend reemployment rights to these merchant mariners who crew the RRF ships in time of war or national emergency.

We hope that Congress will act favorably on this proposal which would enhance our ability to obtain additional civilian manpower for the merchant marine to meet national requirements.

Sincerely,

Warren G Leback

CAPTAIN WARREN G. LEBACK
Maritime Administrator

cc: Members, Committee on Veterans' Affairs

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RESPONSE TO DIFFERENCES BETWEEN S.1095 AND H.R. 1578

Definitions S. 1095 sec. 4303/ H.R. 1578 sec. 2023

The main difference that is noted by our association is the exclusion of the Army and Air National Guard in the Definitions Section of the Senate Bill. The House Bill includes service in the National Guard as qualifying service. S. 1095 includes only the "by the book" definition of service in the uniformed services. We find these definitions set forth in H.R. 1578 to be critical to our membership, and would like to see all National Guard service deemed as "qualifying service" under the provisions of S. 1095.

Enforcement/Assistance in attaining Reemployment S. 1095 sec. 4332 H.R. 1095 sec. 2041

With regards to actually filing a complaint to the Secretary of Labor, we feel that S. 1095 specifically spells out what steps need to be taken by a complainant to ensure that his/her complaint is taken care of as quickly as possible. H.R. 1578 lacks specifics in this area that could increase "red-tape" for a complainant thus increasing the amount of time it would take the Secretary of Labor to react and rectify the situation.

Retention/Regaining Employment S. 1095 sec. 4325 H.R. 2034 sec. 2034

Regarding the retention clauses of both bills, we prefer the language included in the House bill. The extended tenure afforded Guardsmen and Reservists under S. 1095 may cause an employer to be reluctant to hire someone involved in such service. We feel that such discrimination by an employer would be difficult to prove in court even though said discrimination is considered illegal. At EANGUS we must not only strive for equitable representation of the sacrifices of our members, but we must also be assured that these provisions will effect all parties in a positive manner.

The rest of the provisions of either bill are acceptable as stated. We appreciate the opportunity to express the opinion of our membership.

Respectfully,

M Cline

Michael P. Cline
Executive Director

HIAA

Health Insurance Association of America

June 5, 1991

The Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
U.S. Senate
Washington, D.C. 20510

Dear Senator Cranston:

The Health Insurance Association of America would like to take this opportunity to express its support for S. 1095, the "Uniformed Services Employment and Reemployment Rights Act of 1991", which contains language similar to P.L. 102-12 and H.R. 1578, recently passed in the House of Representatives, with regard to health insurance.

Even though there had not been explicit language in the Veterans Reemployment Rights Act requiring health insurers to accept returning reservists back into the employer group without imposing preexisting conditions, limitations or other waiting periods, the industry has generally recognized that the law's intent and legislative history was to prohibit discrimination by employers against veterans returning to work, including non-discrimination in health insurance benefits. Although HIAA welcomes the clarification in P.L. 102-12, S. 1095 and H.R. 1578, several questions have been raised by our member companies, some of which have been addressed in the final legislative language of H.R. 1578 and the House Committee Report (H. Rept. 102-56). HIAA would hope that similar language would be included in either the final Senate bill or report language. The most pressing questions are as follows:

o What happens if the terms of the insurance contract change during the course of the reservists' active duty?

> HIAA interprets the law to require that returning employees be treated as would a similarly situated employee returning from a leave of absence. Therefore, if for some reason the terms of the insurance contract changed during the course of a reservist's active duty, the reservist would presumably be entitled to coverage under the existing group plan, versus the prior plan, upon return. In other words, military personnel returning to the group would not receive preferential treatment.

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HIAA believes that this concern is generally addressed in the House Report but could be made more clear in stronger report language.

o What happens to reservists who return to an employer which is a self-funded ERISA plan (non-insured) or an HMO?

The Veterans Reemployment Rights Act has always been interpreted to apply to employers directly. P.L. 102-12 amended section 2021(b) of Title 38 by adding language with regard to employer-offered health insurance. However, the language in S. 1095 seems to leave open the question with regard to reservists returning to employers who self-insure because of the specific reference to health insurance. More than half (54%) of insurance company group coverage is represented by Administrative Services Only (ASO) arrangements for self-funded employer health plans. In addition Health Maintenance Organizations are not generally considered insurance. If the intent is to truly make sure that returning reservists are re-activated under their employers health plan, then S. 1095 should be amended to require employers to reinstate employees into their health plans as well as to require insurance companies to reinstate returning military personnel into insurance plans.

The House bill, as passed, does address this concern by referring to employer sponsored health benefits and the House Report (H. Rept. 102-56) addresses this issue at page 30 when it quotes H. Rept. 101-862 from last year, by stating that the term "health benefits" is used generically in this section to include insurance plans, self-funded employer health plans (often administered by insurance companies), and health maintenance organizations, which provide health care directly to employees." This language should also be contained in either the Senate bill or its report language.

o Where will the line be drawn with regard to preexisting conditions which occur during active service but which are not really "service-connected" (particularly for dependents)?

Although this is an area delegated to the Secretary to determine, several companies have raised questions regarding conditions which are not "service-connected" but which may arise during the period of active duty. For example, if a child is born with a handicap during the reservists' period of active duty, would the insurer be able to impose a preexisting condition when the reservist and his/her dependents are reactivated into the group plan?

o S. 1095 allows for persons performing service in the uniformed services at their request, and possibly at their expense, to continue to be covered by insurance provided by such employer for up to 18 months. Is this a reference to the continuation of health care rules under the Internal Revenue Code Section 4980 (B) and ERISA Section 601?

> H. Rept. 102-56 also addresses this issue by stating at page 29 that "this protection is similar to the continuation of health insurance under the so-called COBRA provisions of [ERISA, 29 U.S.C. 1161, et seq.,] but applies to all individuals entering the uniformed services without limiting qualifications such as the size of their employer. Similar Senate Report language would be adequate.

o One last interesting question has been raised with regard to dependents who are themselves the reservists returning to the employer plan of their parents. This situation has arisen with college students who were called to active duty while they were in school and when they returned, found themselves unable to return to school until the following semester. As a condition of coverage as a dependent, the insurer often requires that the dependent be a full time student if they are over a certain age. This would mean that upon returning from active duty, the student/dependent would be in "limbo" since they would not technically be a student at the time they are returning to the group. Since both the House and Senate bills do not address this issue directly, it may be an area for new legislative language.

Again, HIAA appreciates the efforts of the Committee to strengthen the Veterans Reemployment Rights Act. Any assistance you could provide the industry in clarifying the Act would be greatly appreciated. If HIAA can be of any help to the Committee, please do not hesitate to contact us.

Sincerely,

Anne Marie Walsh

Anne Marie Walsh
Assistant Washington Counsel

AMW:jm

cc: Linda Jenckes

National Federation of Federal Employees

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June 13, 1991

The Honorable Alan Cranston
Chairman
Committee on Veterans Affairs
414 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Cranston:

On behalf of the more than 150,000 men and women that the National Federation of Federal Employees (NFFE) represents, I would like to thank you for introducing S. 1095, the Uniformed Services Reemployment Act of 1991. Many of NFFE's members were activated during Operation Desert Shield/Storm and face many problems as they begin to return. While current law is designed to protect Federal employees returning to their positions, your bill brings additional safeguards to civilians returning from active duty.

There are several provisions of your bill which we find particularly commendable. First, you provide for individuals to recover attorney's fees. As you can imagine, we endorse such a provision because of the escalating costs of litigating disputes. It would be unfair to place the additional burden of paying for counsel on an employee who should rightfully retain his or her job. Additionally, your bill provides representation through a "representative" of the employee's choice. This will help avert costs by allowing shop stewards or union representatives to provide the necessary services before the Merit Systems Protection Board (MSPB).

Your bill also provides that individuals seeking reemployment rights may be represented by the Office of Special Counsel (OSC) if their claim is found to be valid. While the OSC has improved dramatically in recent years, we still believe that employees should have the right to go to the MSPB directly if they so choose. We welcome the provision in your bill which allows this direct appeal to the MSPB. Additionally, the provision in your bill which requires the OSC to represent a Federal employee throughout all court proceedings is a positive change from the House bill. With this change, Federal employees will not be left hanging in limbo without adequate representation should they wish to appeal various decisions.

NFFE supports S. 1095. Obviously we would prefer that current law, which is designed to protect civilians in similar situations, could be used today. Unfortunately, it seems that various civilian agencies will not uphold the spirit of those laws as dedicated Americans return from the Persian Gulf. Therefore, we look forward to the enactment of the protections provided by S. 1095.

Sincerely,

Sheila K. Velazco

Sheila K. Velazco
National President

NCOA

Non Commissioned Officers Association of the United States of America

225 N. Washington Street • Alexandria, Virginia 22314 • Telephone (703) 549-0311

June 3, 1991

Honorable Alan Cranston
Chairman
Committee on Veterans Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Thank you for inviting additional comments from the Non Commissioned Officers Association on the specific differences between H.R. 1578 and S. 1095, both bills to improve veterans reemployment rights. Our comments on major differences follow.

Scope

The House bill would extend reemployment rights coverage to NOAA members, merchant mariners and others designated by the president in time of war or national emergency. The Senate bill would not expand the universe of people currently assured veterans reemployment rights.

NCOA does not support VRR coverage for merchant mariners or others designated by the president. NOAA however, is a uniformed service of the United States and a federal entity. So too, is the Public Health Service. Both are composed entirely of commissioned officers. While not a military service, NOAA officers have been used in planning some operations and in evaluating the impact such operations would have on the environment and conversely, the impact the environment might have on the operation. Concurrently, public health officers can augment or substitute for military needs. Accordingly NCOA supports the Senate bill and would not object to an amendment extending VRR coverage to members of the uniformed services.

Temporary Positions

H.R. 1578 would exclude temporary positions from VRR protections while S 1095 remains silent on the issue.

NCOA supports the House bill on this issue. Temporary employment has a limited duration value accepted by the veteran prior to activation or enlistment. The performance of military service

Chartered by the United States Congress

should not constitute a change in status. NCOA further believes that failure to directly address this issue in legislation will result in a patchwork of court decisions providing variable treatment of veterans from state to state.

Return to Work

The House bill is somewhat less generous than the Senate bill in providing grace periods between leaving military service and returning to civilian employment. Obviously NCOA supports the more generous provisions of the Senate bill.

Return to Work After Disability

The House bill in this instance is somewhat more generous and flexible in its treatment of veterans than the Senate bill. On this provision NCOA gives its nod to the House provisions.

Documentation Upon Return

H.R. 1578 requires veterans to provide employers reasonable documentation attesting to eligibility for reemployment while concurrently making it unlawful for employers to delay reemployment by requesting documentation that does not exist or is not readily available. The Senate bill on the other hand, requires the veteran to provide similar evidence of reemployment eligibility but requires the employer to reemploy the veteran in the absence of such evidence. Concurrently it authorizes the employer to terminate the employment of any veterans proven to be unqualified by virtue of service.

NCOA endorses the Senate provisions in this section because they give a benefit-of-the-doubt advantage to the veteran while still protecting the integrity of the program by allowing employers to terminate those later disqualified.

Continuation of Insurance Coverage

Both the House and Senate bills allow for the continuation of employer sponsored insurance benefits during military absence but, the language of the House bill is sufficiently ambiguous as to allow employers to charge individuals in military service higher premiums than those paid by or on behalf of other employees. The Senate bill, through more specific language, would limit those additional charges to two percent of the customary charges paid by other employees.

NCOA endorses the more specific language of the Senate bill.

Retention

The House bill would make retention rights contingent on the length of military absence while the Senate bill would link retention rights to the combined length of prior employment and military absence.

Under the House bill an individual with ten years of civilian employment who is activated for two weeks would only have two weeks of retention protection. Under the Senate bill the individual would have six months retention protection. Conversely, under the House bill an employee with 90 days of civilian employment who is activated to military service for seven months would have a full year of job protection while the Senate bill would protect the individual for only six months.

NCOA cannot in good conscience endorse any bill which gives less than six months job protection to any veteran. Yet neither is the association enthusiastic about reducing the protection given in current law to those who have more than six months of military service but less than four years of combined military and civilian service.

Given an either/or choice between the bills NCOA would have to endorse the Senate provisions. However, the association would rather see the House provisions enacted with an amendment to set the minimum retention protection at six months.

Enforcement -- Federal Government Employees

Both bills in this case provide similar complaint and appeal protections to veterans seeking redress within the federal system, but the Senate bill provides additional authorization allowing for the award of legal expenses to veterans who appeal reemployment decisions. NCOA supports the Senate provision.

Enforcement -- State and Private Employees

While the Senate bill contains no provisions allowing penalties the House bill would allow federal courts to impose civil penalties of up to $25,000 on individuals who willfully violate VRR laws.

NCOA believes the penalty provision in the House bill provides a positive incentive to compliance and endorses its enactment.

Subpoenas

Once again the Senate bill goes a step further than the House bill in allowing for the subpoena of federal employees in addition to all others allowed in the House bill. NCOA sees no reason to exclude federal employees from the subpoena provision of the law.

NCOA endorses the Senate provision.

Regulations

H.R. 1578 assigns responsibility to the Secretary of Labor (in consultation with the Secretary of Defense) for drafting regulations pertaining to compliance by state and local governments and private employers. It directs the Office of Personnel management to draft regulations pertaining to the reemployment rights of federal employees, consistent with Labor Department regulations for state and local government and private employees. It would also allow OPM to assign greater or additional rights to federal employees. The Senate bill would not allow the assignment of greater or additional rights to federal employees.

Since state and local governments and private employers are not prohibited from extending additional rights to veterans, and since many do in fact provide additional benefits, NCOA sees no reason why OPM should be prevented from doing the same on behalf of federal employees. The association endorses the House provision.

Outreach Program

The House bill is silent but the Senate bill provides authorization for the Secretary of Labor to conduct outreach activities alerting employers and veterans to new provisions in veterans reemployment rights laws. NCOA endorses the Senate provision.

Thank you again Mr. Chairman, for allowing NCOA to contribute this additional information. Hopefully it will be useful to the committee during its deliberations.

Sincerely,

Charles R. Jackson
Executive Vice President

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue, N.W., Suite 1100
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The Special Counsel

May 22, 1991

Honorable Alan Cranston
Chairman
Committee on Veteran's Affairs
United States Senate
Washington, D.C. 20510-6375

Dear Mr. Chairman:

The Committee on Veteran's Affairs has requested the views of the Office of Special Counsel (OSC) concerning S. 1095, the "Uniformed Services Employment and Reemployment Rights Act of 1991." This legislation would amend title 38 of the United States Code to strengthen and improve the reemployment rights and benefits of members of the uniformed services.

The OSC strongly supports the purposes intended to be accomplished through this and similar legislation. Since the establishment of this agency in 1979, the OSC has not been involved in veteran's-reemployment matters involving federal employees. Proposed section 4333 of title 38 would authorize the OSC to provide legal representation to federal employees concerning reemployment appeals before the Merit Systems Protection Board (MSPB). Similar statutory authority is also contained in H.R. 1578, recently passed by the House of Representatives.

The OSC would undertake the representation contemplated by this legislation after a federal employee had first sought the assistance of the Secretary of Labor, who is required to conduct an investigation, and to undertake efforts to resolve the matter if the employee's allegations appear valid. Failing a resolution of the employee's complaint, the Secretary of Labor is authorized, with the consent of the employee, to refer the matter to the OSC. This agency could conduct an independent review of the matter to determine whether the employee's complaint is valid, and exercise its discretion in deciding whether to initiate an action before the MSPB on behalf of the employee.

While the provision of legal representation to individual federal employees is a departure from the historic role of the OSC in enforcing federal laws, we concur in the assumption of this new responsibility to

Honorable Alan Cranston
May 22, 1991
Page Two

represent employees before the MSPB. We are concerned, however, with proposed section 4333(e) which would permit the OSC to represent these employees before the federal courts in the event of an adverse decision of the MSPB. This could create an anomalous and unacceptable conflict of interest within the Executive Branch wherein this agency would be representing an interest in court that is contrary to a position advocated by the Department of Justice on behalf of another agency, and ultimately the United States. Accordingly, we recommend deletion of this provision.

Apart from this concern just expressed, we are confident that our legal staff is more than able to represent adequately the interests of federal employee veterans and reservists. Although the OSC has no basis to quantify the number of matters we might receive if this legislation is enacted, we do not believe, at this time, that it will have a significant impact on the OSC's caseload.

I am pleased to have had the opportunity to express the views of the OSC concerning this important legislation. Whatever final form this legislation may take through the efforts of the Congress and the Administration, you may be assured that the OSC will endeavor to do its part to protect the reemployment rights of federal employees who have served, and are still serving, their country in the military services.

Yours truly,

Mary F. Wieseman
Special Counsel

Reserve Officers Association of the United States
The Professional Association Representing All Officers

June 7, 1991

The Honorable Alan Cranston
Chairman, Veterans Affairs Committee
United States Senate
Washington D.C., 20510

Dear Senator Cranston:

The Reserve Officers Association greatly appreciates your timely consideration of veterans' reemployment rights and the depth of your efforts. We are grateful for the opportunity you have afforded us to comment on this important issue.

Enclosed are our comments on the substantive differences between the House (H.R. 1578) and Senate (S. 1095) bills. On some of the differences we either lack the necessary experience or expertise or otherwise have no position. We have provided comments on only those issues we were able to address.

We hope you will find the comments helpful and we thank you again for your consideration.

Alan –
We deeply appreciate
all your great efforts!
Every good wish! —

Sincerely,

Evan L. Hultman
Major General, AUS (Ret.)
Executive Director

ELH:dlb

Army ★ Navy ★ Air Force ★ Marine Corps ★ Coast Guard ★ Public Health Service ★ NOAA

One Constitution Avenue, N.E., Washington, D.C. 20002-5624 ★ Telephone: (202) 479-2200

COMMENTS REGARDING DIFFERENCES
Between H.R. 1578 and S. 1095

Scope

The House bill confers reemployment rights upon those who serve in the National Oceanic and Atmospheric Administration (NOAA), the Merchant Marine, as specified, and any other category of persons designated by the President in time of war or national emergency. Because NOAA has no reserve component, the need to confer reemployment rights on those who serve with the agency lacks some validity. Extending reemployment rights to the Merchant Marine during times of war or national emergency could greatly add to the availability of members of the Merchant Marine during emergencies and thus be very important to national security. The DESERT STORM experience suggests the importance in being able to recruit members of the Merchant Marine and the importance of their availability to the defense effort. This reasoning could apply to other categories, and we would thus urge that the House provision be sustained.

Temporary Positions

The intent and spirit of law becomes as important as the language and the provision of coverage for temporary positions may be a case in point. Many "temporary" employees should probably be excluded from the law, but by excluding temporary employees a "loophole" is provided which some employers will try to use. ROA is aware of college professor who has been with an institution for more than four years, but because she is not a full-time professor, she is considered a "temporary" employee. ROA believes a person who has been employed more than a short time should be protected by the law. Fearing that the exclusion of temporary employees would exclude some who should be covered, we would favor the Senate position.

Return to work After Disability

The Senate provision does seem to best meet the needs of those affected.

Retention

Both House and Senate bills address periods of time during which a person who is reemployed by an employer cannot be discharged from employment, except for cause. While the proposed language of both bills may appear to provide additional protection, by providing statutory time periods, the proposals imply that after these specified time periods an employer is free to discharge the individual following active duty service in the uniformed services. The implication may actually cause employers to discharge more personnel who are participating in Reserve programs at the end of the statutory periods and thus affectively reduce protection rather than add to it. The discharge provisions seem to be in contradiction to the intent of the legislation. Thus, ROA does not support the adding of statutory periods during which discharge is prohibited.

Enforcement--Federal Government Employees

Probably because a high percentage of Reservists are employed by local, state and federal governments, many of those who have had difficulty with their employers have been employed by government. While we do not strongly favor the language of one bill over the other, the feeling is that the Senate version might provide better protection.

Enforcement--State and Private Employees

ROA supports the House provision for a penalty for violators of reemployment rights. While the provision is not intended to create an adversarial relationship, the provision does put some teeth into the law.

Subpoenas

ROA strongly supports the provision of subpoenas to assist in the investigation of alleged violations. We feel that the Senate provision which includes federal employees, is also important to investigations and ultimately to insuring compliance.

Outreach Program

The National Committee for Employer Support of the Guard and Reserve is to be commended for its accomplishments in promoting public understanding of the National Guard and Reserve and is very helpful in resolving many of the reemployment questions which arise. In spite of the Committee's outstanding contributions, the DESERT SHIELD/DESERT STORM experience would suggest that more could be done to further the awareness of reemployment rights. The outreach program provision in the Senate bill could contribute greatly to this needed awareness.

The American Legion

For God and Country

• WASHINGTON OFFICE • 1608 "K" STREET, N.W. • WASHINGTON, D.C. 20006 •
(202) 861-2700 •

May 30, 1991

Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510-6375

Dear Senator Cranston:

Enclosed with this correspondence are comments by The American Legion on the differences between S. 1075 and H.R. 1578. Also enclosed is a copy of The American Legion's survey of employers which you requested during the hearing on May 23.

Thank you for the opportunity to offer our comments on the important issue of reemployment rights for veterans. We look forward to working with you and the Committee on passage of this important legislation.

Sincerely,

James B. Hubbard, Director
National Economic Commission

COMMENTS ON DIFFERENCES
BETWEEN
H.R. 1578 AND S. 1095
BY
THE AMERICAN LEGION

Section 2023 of the House bill would include members of the merchant marine and National Oceanographic and Atmospheric Administration and other unspecified groups in the law provided the President designated them. The American Legion sees no reason to include these groups. This organization opposed the granting of veteran status to merchant mariners after WWII. One would be hard pressed to come up with any circumstances under which a member of NOAA would qualify for reemployment rights under any circumstances since, to our knowledge, no one has ever been conscripted for duty in NOAA, and NOAA maintains no reserve force.

With respect to temporary positions, The American Legion prefers the Senate bill which contains no exclusions for temporary positions.

Section 2032(c) of the House bill contains language preferable to that of the Senate bill in our view, with the addition of the following language in (1). The words "(with a reasonable extension if a delay is beyond the employee's control)" should be added after the phrase "place of employment". In our view, the House bill is preferable since it grants an absolute right to reemployment in all cases rather than requiring an employee to file a new application for employment if the service lasts longer than 31 days. This requirement implies that the employer has no duty under law to reemploy the veteran. Current law is more stringent than the Senate version.

Realizing that some employers may be harmed by any blanket provision granting unrestricted right to reemployment to a disabled veteran, The American Legion prefers the language contained in S. 1075 with regard to a return to work after disability situation. There exists the possibility of abuse of the system under the blanket language contained in the House version of the legislation.

With regard to provisions requiring the returning service member to provide documentation upon return to his/her job, language in S. 1075 seems to protect both the employer and employee from abuse. Giving the employer the right to terminate if a failure to meet eligibility requirements exists is a fair way of addressing this potential problem area of law.

The provisions for continuation of insurance coverage offer some interesting contrasts. While H.R. 1578 seems to offer adequate protection, The American Legion prefers the additional provision of limiting premium payment to 102% of the payment required of other employees. Information revealed during our survey of employers and their treatment of members of the National Guard and Armed Forces Reserves showed that some group health/life policies offered by some companies required the company to drop the employee called to active duty from the group policy. When the employee is dropped, the family is dropped also. In the case of a family who resides at some considerable distance from a military medical facility, great hardship could result. Thus, protecting the employee called to active duty and his family by continuing coverage under a group health/life policy while at the same time preventing a huge premium increase seems to be a wise idea.

With regard to the retention provisions, tying a minimum period of employment to seniority with the employer (including active duty time) makes a great deal of sense. The Senate provision would help protect the right of a company to downsize while some of its employees were on active duty, and at the same time grant employment to returning service members so as to allow them a period of adjustment back into society. Presumably, an employer who was in the process of downsizing would notify returning veterans of their need to seek other employment since their tenure with the shrinking company would be limited.

The Senate language, as contained in S. 1075, with regard to enforcement of reemployment rights for federal employees is preferable to that of the House bill. In our testimony before the Veterans Affairs Committees of both bodies, we specifically recommended the provision of attorney fees, and access to the courts. The American Legion is pleased with the addition of these provisions.

On the other hand, The American Legion prefers the language contained in HR 1578 with regard to enforcement with state and private employers. In our view, a $25,000 sanction is a means to deter a business from discriminating against a returning veteran. There is some evidence which suggests that most returning reservists and members of the National Guard worked for small businesses prior to their call to active duty. A fine such as that suggested in the House bill will prevent abuse, in our view.

With respect to subpoenas, the Senate bill, which includes federal employees, is preferable.

In a similar vein, The American Legion agrees with the Senate provisions on outreach, provided that Congress provides the funding necessary to carry out the outreach tasks envisioned by the legislation.

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

May 31, 1991

The Honorable Alan Cranston
Chairman, Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510-6375

Dear Mr. Chairman:

Attached are the VFW's comments regarding the positions we favor between H.R. 1578 and S. 1095, the two veterans' reemployment rights bills.

This is the follow-on action mentioned at your hearing on Thursday, May 23, 1991, when bill S. 1095 was considered.

Sincerely,

Bob Manhan
BOB MANHAN, Special Assistant
National Legislative Service

Enclosure

★ WASHINGTON OFFICE ★
VFW MEMORIAL BUILDING ● 200 MARYLAND AVENUE, N.E. ● WASHINGTON, D.C. 20002-5799 ● AREA CODE 202-543-2239

VFW POSITIONS ON VETERANS' REEMPLOYMENT RIGHTS BILLS

SCOPE

S. 1095, new section 2023, is the cleaner/stronger veterans' bill and is more closely related to existing law because it does not include NOAA, the Merchant Marines, or any of the other entities specified later by the president.

TEMPORARY POSITIONS

H.R. 1578, new section 2032(a), which excludes temporary positions from reemployment rights coverage is the more reasonable approach, from both the employee and employer's point of view.

RETURN TO WORK

S. 1095, new section 4322(d), is favored primarily because of the specific language that requires the returning employee to submit an application for reemployment. This has the distinct advantage of allowing the employer to make necessary arrangements, particularly as it may effect new temporary hirees employed in the absence of a Reservist or national guard person.

RETURN TO WORK AFTER DISABILITY

H.R. 1578, new section 2032(d), contains the requirement that the disabled employee keep his former employer informed of intention to return to work as well as rehabilitation progress. We feel this is a necessary requirement for the employer to properly plan for needed building/job modifications to better accomodate the disabled employee at some agreed upon time in the future.

DOCUMENTATION UPON RETURN

H.R. 1578, new section 2032(f), which requires the employee to provide certain military separation documentation is a minimum requirement any employer should expect to receive. This language will favorably influence the separation processing for all categories of reservists and national guard persons who serve only a brief period of time on active duty; i.e. this language will ensure that Department of Defense provides all separating military personnel immediately with at least an abbreviated version of the active duty discharge form DD-214.

CONTINUATION OF INSURANCE COVERAGE

H.R. 1578, new section 2034(c), which would allow an employee called to active duty to continue the employer offered insurance coverage should be properly paid for one hundred percent by the employee for any period of time to exceed 31 days. The VFW believes the combination of active duty medical coverage and its supplemental Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) may provide for on-going medical care anywhere in the United States. Therefore, it is unreasonable to ask the employer to continue to pay any portion of an unnecessary employee benefit.

RETENTION

H.R. 1578, new section 2034(e), establishes the more equitable, overall periods of employment, except in those instances where an employee is discharged for cause, which is the same as in the senate bill.

ENFORCEMENT — FEDERAL GOVERNMENT EMPLOYEES

The VFW favors retaining all of H.R. 1578, new section 2043 AND adding a modified version of S. 1095, new section 2044, saying in effect:

> "The award of reasonable attorney fees, expert witness fees, and other litigation expenses are authorized only when the Office of Special Counsel cannot or will not represent the employee."

This recommendation has the distinct advantage of combining the best of both bills and thereby ensures that employees will be properly and adequately represented by competent counsel at the federal employment level.

ENFORCEMENT — STATE AND PRIVATE EMPLOYERS

H.R. 1578, new section 2044, does have the advantage of providing for a significant fine in cases of "willful violation of reemployment rights...." We strongly recommend the senate version incorporate this philosophy and add the federal government as another employer subjected to the same level of enforcement/punishment. This is simply a matter of employer equity and an expansion of protection for veterans.

SUBPOENAS

S. 1095, new section 4341, is favored simply because it includes federal employees. The VFW rationale here is the equitity argument used for the enforcement issue, cited above.

REGULATIONS

H.R. 1578, new section 2061, has the distinct advantage of continuing the philosophy that the federal government should set a positive example by requiring that federal government employees may be given greater or additional reemployment rights than the minimum regulations governing state and local governments and the private sector employers.

OUTREACH PROGRAM

S. 1095, new section 4351(d) is an absolute requirement, in the judgment of the VFW, to publicize to all interested/concerned employees and employers what their respective rights and obligations are under any new reemployment rights law.

In summary, the above 12 comments all tend to expand the reemployment rights for veterans and/or provide for meaningful sanctions against employers who discriminate against returning veteran employees. The last trend we strongly support is to require the federal government to be an active and positive employer regarding veterans. This is more necessary as Department of Defense incorporates Reservists and national guard units into its total force concept to better respond to situations requiring the projection of U.S. military strength as we end this century and enter the next.

Vietnam Veterans of America, Inc
1224 M Street, NW
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June 19, 1991

Honorable Alan Cranston, Chairman
Senate Committee on Veterans Affairs
SR-414 Russell Senate Office Bldg.
Washington, DC 20510

Dear Chairman Cranston:

This letter will respond to your May 24, correspondence asking for comment on the differences between pending House and Senate veterans reemployment rights bills, S.1095 and HR.1578. Our comments will be limited to those matters on which we are sufficiently competent to speak.

Scope

The House bill, but not the Senate bill, would confer reemployment rights on those who served in the National Oceanic and Atmospheric Administration (NOAA) or the Merchant Marine during time of war, national emergency or when deemed necessary by the Secretary of Defense. Other categories of individuals too could gain reemployment rights if designated by the President in time of war or national emergency.

Without being sure of why reemployment rights would be conferred on those having served with NOAA or others, there seems good reason to confer reemployment rights on Merchant Mariners. Those who have opposed veteran status for Merchant Mariners in the past have typically pointed out that this type of service is voluntary rather than involuntary and offers Merchant Mariners the right to terminate employment at any time by contrast with regular armed forces personnel who may not simply quit the military when it is found to involve dangerous duty.

This argument, however, fails the distinction between voluntary and involuntary service when a crew of Merchant Mariners reaches a foreign port. As we understand it, Merchant Mariners may not quit employment on a ship in a foreign port. Under the circumstances, the contents of shipments such as war material or other sensitive cargo can be unknown to the crew just as the ultimate destination of these shipments can be held secret from the crew. For example, cargo shipments of this nature during the Vietnam era were at times scheduled for Vietnam via the Philippines

• A not-for-profit national veterans' service organization •

without the crew knowing of the ultimate destination until after reaching the Philippines. Since these crew members were unable to quit the Merchant Marine in the Philippines, their service in hazardous war zones such as Vietnam has to be seen as involuntary in the same manner as for members of the regular armed services.

There may be similar reasons for offering reemployment rights to other groups. Without knowing what those similar reasons or peculiar conditions of service might be it, is inappropriate for VVA to offer guidance.

Temporary Positions

The House bill, but not the Senate bill, would exclude temporary positions from protection under the reemployment rights legislation. Given the broad range of kinds of positions that might be variously characterized as temporary, it seems wise to undertake an effort in the legislation to define the term temporary position in order to make the obligations of employers understandable and to offer clarity to the individuals engaged in these positions as to what positions are intended to be protected.

Return to Work

Both House and Senate bills make an assumption, depending on length of active duty, about the time needed to reasonably expect a veteran to return to work at his or her old job. This assumption may not be appropriate if the nature of service in a combat theatre was particularly stressful and/or hazardous. A uniform period irrespective of length of active duty seems a more appropriate choice. The period within which a veteran must return to a previously held job should be sufficiently generous to allow reacquaintance with a spouse or family as well as for readjustment to a less stressful civilian environment, perhaps 90 days.

Return to Work After Disability

The House and Senate bills each offer options governing the period within which a disabled veteran is expected to return to work at a previously held job. There are positive aspects in each bill that are compatible and should be combined to offer the greatest possible reasonable flexibility where veterans disabled in service are concerned. The Senate bill's two year extension on reporting to work should be coupled with the House bills "or the minimum time required to accommodate the circumstances beyond the individual's control".

Moreover, there are two policy issues of significance here that are deserving of consideration. The first of these is the extent to which employers should be expected to maintain an opening, perhaps unable to hire a replacement, for an extended period of time. This first issue has obvious relevancy to small business employers. The second issue is the extent to which disabled, particularly severely disabled, veterans should be in jeopardy of losing a previously held position. It is unclear how each of these matters could be addressed legislatively without working some type of potentially arbitrary hardship on either employers or disabled veterans. Without being in a position to offer any particular guidance to the committee, we raise these policy issues so that the committee might find a way to craft a legislative solution.

Documentation Upon Return

The House and Senate provisions on documentation are similar but the Senate's added provisions governing potential fraud by an employee make the Senate version more balanced and, therefore, preferable.

Mr. Chairman, the balance of the itemized differences between the House and Senate reemployment rights bills outlined in your letter are matters on which we are unprepared to offer comment. As always, your interest in the views of VVA is appreciated.

Sincerely,

Paul S Egan

Paul S. Egan
Legislative Director

United States
Court of Veterans Appeals

Chambers of
Chief Judge Frank Q. Nebeker

625 Indiana Avenue, N.W., Suite 900
Washington, D.C. 20004
202-501-5982

May 28, 1991

Honorable Alan Cranston
Chairman
United States Senate
Committee on Veterans Affairs
Washington, D.C. 20510-6375

Dear Mr. Chairman:

Enclosed is my response to your questions for the record of the May 23, 1991, hearing on H.R. 153 and S. 1050.

Sincerely,

Frank Q. Nebeker

Frank Q. Nebeker
Chief Judge

Enclosure

HEARING ON H.R. 153 AND S. 1050
QUESTIONS SUBMITTED BY SENATOR ALAN CRANSTON
TO THE UNITED STATES COURT OF VETERANS APPEALS

1. A. What is the Court doing to ensure that its opinions are published in a manner that is best adapted for public information and use, as required under section 4069(a) of title 38? I understand that the electronic legal research systems LEXIS and WESTLAW, which are picking up the opinions, are relatively expensive tools and not as accessible to many veterans and potential appellants as are opinions published in the various legal reporters and similar publications.

The Court's opinions are published pursuant to its order of March 7, 1990 (enclosed). All opinions are sent to the addressees on the mailing list (enclosed) of publishers and certain veterans service organizations. The Washington Daily Law Reporter prints all of the Court's opinions and, because of their increasing number, recently announced that it would print them in edited form. Other publishers and veterans service organizations have always been free to print or report the Court's opinion, and several have done so on a selective basis. In addition, the Court has urged that the Department of Veterans Affairs make these opinions available to its regional offices, where most appellants make direct contact with the VA claims process. Of course, all opinions are placed in the Court's press box and a set is maintained in the Court's public reading room.

The Court also is advised that the West Publishing Company anticipates reporting of the Court's opinions with the usual key-numbered headnotes by August. West will print the opinions in "advance-sheets" and send them to subscribers of the opinions monthly; then as required those opinions will be bound in a hard-back numbered volume, just as West does for the Court of Military Appeals opinions. Of course, this will be without printing costs to the Court.

B. Please provide for the record a paper describing the various alternatives for publishing the Court's cases and opinions, including the costs associated with those alternatives.

The Court has sought expressions of interest from several legal publishing firms. Responses have been general in nature, with estimated cost to the Court ranging from zero to $50,000. The Court could, at considerable public expense, hire its own staff to print its opinions and distribute them through a subscription service. Private publication based on market expectation could accomplish this better and without public expense; we are attempting to follow that approach, as do other appellate courts.

2. In order to provide the Committee with a better understanding of what is involved in the proposed judicial conference that section 2 of H.R. 153 would authorize, please explain how you envision such a conference functioning: for example, what the purpose would be, who would attend, what the format would be, what kinds of subjects would be discussed or taught, what you expect to accomplish at such an event, and what its likely cost would be.

> As I mentioned in my testimony, the primary purpose of a judicial conference is to provide a forum for direct discussion of issues of concern to the Court and its practitioners. While the judicial conference for the Federal Circuit, of which this Court is a part, provides annually for a two or three hour break-out session in May, that is not sufficient. In addition, non-attorney practitioners are not invited to that conference in sufficient numbers. Although judicial conferences of other courts normally are restricted to attorneys, the Court will include our non-attorney practitioners as regular participants and will invite representatives of major veterans service organizations. The educational program would consist of panel discussions, seminars, and a distinguished guest speaker and would include such topics as the art of appellate advocacy and the application of the Court's Rules of Practice and Procedure. Also many issues respecting Department of Veterans Affairs record keeping and other internal matters need to be resolved through exchange of views and consensus arrived at by action of a judicial conference. Conference action traditionally involves practice issues which have arisen during the previous year.
>
> The Court has requested $45,000 to support its first conference in FY 1992. This would be a one or one-and-one half day event, held in Washington, DC, to reduce travel and per diem costs for the majority of participants. To maximize participation, we prefer initially not to impose a registration fee. While attendees would pay for meals, the Court would absorb the normal costs of a conference facility, audio-visual support, coffee breaks, speaker fees and expenses, and the printing of invitations, programs, and packet material.

UNITED STATES COURT OF VETERANS APPEALS

U.S. COURT OF VETERANS APPEALS
FILED

IN RE:

PUBLICATION OF DECISIONS.

Before: Nebeker, Chief Judge, Kramer and Farley, Associate Judges.

ORDER

It is the 7th day of March, 1990, ORDERED, *sua sponte*, pursuant to 38 U.S.C.A. § 4069 (West Supp. 1989), that upon the filing by the Court with the Clerk of any decision in any appeal or other proceeding before the Court, the Clerk shall cause the decision to be published by sending or releasing it to the parties and releasing it to the public, including transmission by mail or otherwise to any publisher who stands ready to provide it for public information and use. The Court may make an exception to the foregoing requirement of publication, on a case-by-case basis, as may be required. The publication of a decision, as provided herein, shall be deemed to be authorized under § 4069(b).

PER CURIAM.

OPINIONS MAILING DISTRIBUTION

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United States
Court of Veterans Appeals

Chambers of
Chief Judge Frank Q. Nebeker

625 Indiana Avenue, N.W., Suite 900
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202-501-5962

May 31, 1991

The Honorable Alan Cranston
Chairman, Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510-6375

Dear Mr. Chairman:

I have your letter of May 23, 1991, and the attached pages eleven and twelve of the hearing transcript of last Thursday. You requested my view as to the desirability of providing for participation of persons active in veterans affairs claims representation in the judicial conferences of the Court proposed to be authorized by section 3 of H.R. 153.

As I earlier testified, a major purpose of seeking authorization for a court judicial conference is so that non-lawyers involved in veterans claims representation can be included in conference activity and action. The Court has no objection to being authorized by law to do so.

Sincerely,

Frank Q. Nebeker
Chief Judge

FQN:acg

WRITTEN QUESTIONS FROM CHAIRMAN CRANSTON TO THE DEPARTMENT OF DEFENSE AND THE RESPONSES

Senator Cranston: I compliment the Department on the excellent pamphlets entitled "Released from Active Duty -- What Now?" and "Memorandum for Employers". How widely are these publications being distributed among employers and members of the Selected Reserve and National Guard?

Mr. Duncan: Some 250,000 copies of "Released from Active Duty - What Now?" have been printed. Our objective was to get a copy to every National Guardsman and Reservist who served on active duty in support of the Persian Gulf conflict and to the families of these members. The pamphlet was also distributed to employers and community leaders from all over the country at the conference of the National Committee for Employer Support of the Guard and Reserve which was held in Saint Louis on April 18-20. As you know, the veterans' benefits and protections which were included in the Soldiers' and Sailors' Civil Relief Act Amendments of 1991 and the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 are covered in the pamphlet. We appreciate the support of the Committee in the enactment of these important improvements.

The "Memorandum for Employers" has been distributed to employers throughout the Nation by the state committees for Employer Support of the Guard and Reserve. In addition, the Society for Human Resource Managers supported the distribution of 40,000 copies of the Memorandum to their members nationwide. In all, 200,000 copies were printed for distribution.

Senator Cranston: On page 2 of the Department's testimony, the Department stated the importance of stand-by provisions to provide employment protections to the Merchant Marine in certain emergency situations.

A. Please explain why you believe these provisions are important.

B. Would this same reasoning apply to employment protections for the National Oceanic and Atmospheric Administration? Please explain.

Mr. Duncan: Especially in times of emergency, the Merchant Marine performs an essential function for the national defense. Personnel can be transported by air, but much military cargo must be transported by ship. During the buildup for Operation DESERT STORM, it was necessary to recruit experience mariners from other lines of work to operated the vessels carrying military cargo to the Persian Gulf region. Under current law, those persons do not have reemployment rights. A statutory provision which provides the flexibility to accord reemployment rights to members of the Merchant Marine in such emergency circumstances, as was done in World War II, will help to ensure their availability when they are needed.

The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is one of the seven uniformed services. While only about 400 strong, it is important that the NOAA commissioned corps be included in matters relating to all uniformed services. The NOAA commissioned corps is, for example, represented in the quadrennial reviews of military compensation which are mandated by law. In addition, many rules of law that apply to the Armed Forces apply also to the commissioned officers of NOAA, and active service of commissioned officers of NOAA is deemed to be active military service for the purposes of laws administered by the Department of Veterans Affairs.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

July 5, 1991

Honorable Alan Cranston
Chairman
Committee on Veterans Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the Department's responses to your questions posed in connection with the Committee's hearing held on May 23, 1991, to consider S. 1095, the Uniformed Services Employment and Reemployment Rights Act of 1991.

Please do not hesitate to contact me if we may be of further assistance.

Sincerely,

W. Lee Rawls
Assistant Attorney General

RESPONSES OF DEPARTMENT OF JUSTICE TO POST-HEARING QUESTIONS

1. On page 1 of the Department's testimony, it was noted that "the Administration submitted to the Congress, in March 1991, a bill to amend the Veterans' Reemployment Rights" statute. When and to whom was this bill submitted in the Senate and the House and by what means?

Response: We have consulted with the Department of Labor ("DOL") regarding this question, since DOL drafted the Administration's bill and submitted it to the Congress after review and clearance by the Office of Management and Budget. DOL has informed us that its Office of Congressional and Intergovernmental Affairs hand-delivered copies of the bill, on or about March 7, 1991, to Senator Dole's Office and to staff members of both the House and Senate Veterans' Affairs Committees. DOL has advised us that it will provide the Committee with any additional information desired in response to this question.

2. On page 7, the Department urged the Committee to include in its definition of "uniformed services" the Merchant Marine, the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA), and other categories of persons as designated by the President in time of war or national emergency.

A. In terms of the basic purposes of the VRR legislation to provide job protection for non-career servicepersons and reservists, please provide a detailed rationale for including the Merchant Marine and NOAA.

B. What groups does the Administration expect would be included in the other category of persons to be designated by the President and in what circumstances would such a designation be made?

Response: We have consulted with the Department of Defense ("DOD") regarding this question because of its expertise in this area and our response is based largely upon the information DOD provided. In time of war or national emergency, the Merchant Marine performs essential functions for the national defense. For example, during Operations Desert Shield and Desert Storm, the Merchant Marine transported substantial amounts of military cargo to the Persian Gulf. In order to do so, it was necessary for the Merchant Marine to recruit experienced mariners from other employers. Under current law, such persons do not have reemployment rights. Providing reemployment rights to those who serve in the the Merchant Marine during time of war or national emergency will help ensure the availability of experienced mariners when they are needed and will recognize the essential role the Merchant Marine plays in the national defense.

The commissioned corps of NOAA ("NOAA corps"), which presently consists of approximately 400 members, is one of the seven uniformed services. The NOAA corps operates and manages NOAA's fleet of hydrographic, oceanographic, and fisheries research ships and aircraft, and supports NOAA scientific programs. Many of the provisions of titles 10 and 37, United States Code, applicable to the Armed Forces also apply to the NOAA corps, see 10 U.S.C. § 101(43) and 37 U.S.C. § 101(3), and service in the NOAA corps is deemed to be active duty military service for the purposes of laws administered by the Department of Veterans Affairs and the Soldiers' and Sailors' Civil Relief Act of 1940. 33 U.S.C. § 857-3. In addition, under current law, the President is authorized to transfer the NOAA corps to the service and jurisdiction of a military department in the event of a national emergency. 33 U.S.C. § 855. The NOAA corps should be afforded the protections of the VRR law because members of the corps perform services for the Nation which are as important as the services performed by members of the other uniformed services. For example, some members of the NOAA corps recently served in the Persian Gulf area during Operation Desert Storm. Providing reemployment rights to the NOAA corps should not unduly burden private employers since most members of the corps are recruited directly out of college and remain with the corps on a career basis.

Finally, while it is difficult to predict what other categories of persons might be designated by the President as a "uniformed service" for the purpose of the VRR law, the Administration bill provides that such a designation would be made only in time of war or national emergency. During World War II, Women's Air Service Pilots (then commonly known as "WASPS") performed important services in the interest of national defense but were not covered by the VRR law. This provision of the Administration's bill is intended to grant the President authority to respond to such special circumstances as they arise and to obviate the need for additional legislation.

3. Both the Administration draft of a Veterans Reemployment Rights bill and H.R. 1578 would repeal subsection 631(j) of title 28, United States Code, providing for the reinstatement rights of a magistrate ordered to active duty in the Armed Forces for more than 30 days. However, revisions of chapter 43 of title 38 proposed therein call for Office of Personnel Management reemployment assistance of judicial branch employees only if such employees are qualified for competitive service under section 3304(d) of title 5. Please explain how deletion of section 631(j) of title 28 would affect magistrates who are not so qualified at the time of entry on active duty.

Response: First, we note that both the Administration bill and H.R. 1578 provide for Office of Personnel Management reemployment assistance to judicial branch employees where such employees are qualified for the competitive service under section 3304(c), not 3304(d), of title 5, United States Code. See section 2029(e) of the Administration bill; section 2042(d) of H.R. 1578.

Construing both the Administration bill and H.R. 1578 liberally, a magistrate (or any other judicial branch employee) is entitled to reinstatement unless his or her judicial branch employer determines that: (1) reinstatement is not feasible; and (2) the magistrate is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(c) of title 5, United States Code (*i.e.*, the magistrate is qualified for the competitive service under section 3304(c)). See section 2029(a),(e), of the Administration bill; section 2042(a),(d), of H.R. 1578. Under such a construction of the Administration and House bills, a magistrate who is not qualified to enter the competitive service pursuant to section 3304(c) of title 5 would be entitled to reinstatement by his judicial branch employer, and repeal of section 631(j) of title 28 would have no effect on the reemployment rights of magistrates who are not qualified for the competitive service. The sectional analysis accompanying the Administration's bill supports this interpretation. It states that section 631(j) of title 28 is deemed redundant in view of the protections afforded magistrates in the Administration bill.

It is possible, however, to construe the Administration bill and H.R. 1578 as allowing a judicial branch employer to deny a magistrate (or any other judicial branch employee) reinstatement where the employer's circumstances have so changed as to make reinstatement impossible or unreasonable, regardless of the magistrate's qualifications for transfer to the competitive service under section 3304(c) of title 5. See section 2025(a), (i), of the Administration bill; section 2032(a) of H.R. 1578. If the Administration and House bills were so construed, repeal of section 631(j) of title 28 would leave a magistrate who was not qualified for the competitive service with less protection than that provided under current law.

U.S. Department of Labor

Assistant Secretary for
Veterans' Employment and Training
Washington, D.C. 20210

July 22, 1991

The Honorable Alan Cranston
Chairman, Committee on
  Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As requested, enclosed are our responses to the questions raised following the May 23 hearing on revisions to the Veterans' Reemployment Rights Statute. I apologize for the delay in forwarding them to you.

If you need additional information, please let me know.

Sincerely,

Thomas E Collins

THOMAS E. COLLINS

Enclosures

POST HEARING QUESTIONS
FROM
Senate Veterans Affairs Committee
(Hearings on S. 1095)

1. In 1988 a profile of Veterans Reemployment Rights (VRR) complaints presented at a House Veterans Affairs' Committee hearing indicated that 38 percent of all such complaints considered by the Department of Labor involved reinstatements; 27 percent involved seniority, status and pay; 20 percent involved discharges; and the remaining 15 percent involved pensions, vacations, and other fringe benefits. The VRR complaint profile also indicated that 61 percent of the cases involved reservists or members of the National Guard.

A. Do VRR complaints continue to follow the 1988 profile? If after reviewing your statistics you find the complaint profile to be significantly different, please provide an updated assessment for the record.

B. Do high volume activity areas in the VRR complaint profile reflect an ambiguity in current law or natural points of conflict in the reemployment area?

A. Our data on VRR complaints has been refined since then by the addition of other issues. In 1988 we only had eight categories of issues, a number that has been increased to 14 categories of issues for 1989 and 1990.

The essential difference is that in 1988 a large percentage, 38 percent of our complaints, involved reinstatement. This percentage dropped to 24 percent in 1989 and 26.4 percent in 1990. Also, the percentage of discharge complaints dropped from 20 percent in 1988 to 13.6 percent in 1989 and 11.3 percent in 1990.

These reduced percentages in reinstatement and discharge complaints appear to be largely due to a new category: "Lost

Wages," which accounted for 18.6 percent of our cases in 1989 and 18.3 percent in 1990.

Another new category, Discrimination, accounted for 2.4 percent of complaints in 1989 and 2.2 percent in 1990.

A complete breakdown is provided below for your information. Numbers do not tally to 100% due to rounding off:

	1989	1990
Seniority	14.5%	11.4%
Discrimination	2.4%	2.2%
Discharge	13.0%	11.3%
Lost Wages	18.6%	18.3%
Pay Rate	4.7%	5.3%
Pension	2.7%	2.8%
Reinstatement	24.0%	26.4%
Status	6.7%	8.0%
Vacation	6.0%	5.9%
Health Benefits	0.8%	0.2%
Layoffs	0.7%	0.8%
Other Benefits	0.2%	1.3%
Other	3.4%	3.8%

B. We generally equate the high volume categories to natural points of conflict and to misunderstandings as to the requirements of the law. It is our estimate that misunderstanding of the law is the most prevalent. It is noteworthy that over nineteen out of every twenty complaints are resolved short of litigation, many on the basis of negotiated settlements.

2. Both the Administration draft of a VRR bill and H.R. 1578 would repeal subsection 631(j) of title 28, United States Code, providing for the reinstatement rights of a magistrate ordered to active duty in the Armed Forces for more than 30 days. However, revisions of chapter 43 of title 38 proposed therein call for Office of Personnel Management reemployment assistance of judicial branch employees only if such employees are qualified for competitive service under section 3304(d) of title 5. Please explain how deletion of section 631(j) of title 28 would affect magistrates who are not so qualified at the time of entry into active duty.

Note: The question that we received referred to section 3304(d) of title 5, but we believe that section 3304(c) was intended.

Under current VRR law, all judicial branch employees are to be reemployed by that branch (see 38 U.S.C. § 2023(c)), although an enforcement scheme is lacking. A magistrate, under 28 U.S.C. § 631(j), has an independent right to reemployment if the term of office has not expired. If not reemployed, however, judicial branch employees currently do not enjoy the same right to reemployment in the executive branch as is afforded to legislative branch employees. See 38 U.S.C. § 2023(b).

The Administration proposal and H.R. 1578 fundamentally change the nature of the protection for judicial branch employees. Judicial branch employees, including magistrates, would continue to have a right to reemployment with that branch. In certain circumstances, however, reinstatement to the original position may not be feasible. Under a liberal construction of the proposed statutory language, if the judicial branch employer determined that reinstatement is not feasible and the employee is eligible for transfer to the executive branch pursuant to the terms of 5 U.S.C. Sec. 3304(c), then the employee shall be offered amployment in an alternative position (of like seniority, status, and pay) in the executive branch.[1] Magistrates, and other judicial branch employees who may be unable to meet the requirements of section 3304(c) (2), would not have this additional protection and would rely on their reemployment rights for reemployment by the judicial branch.

The Administration proposal and H.R. 1578 would create a new safety net, similar to that provided to employees of the legislative branch, for certain employees of the judicial branch. This safety net was created in order to make treatment of those employees consistent with the treatment afforded legislative branch employees and National Guard technicians. A safety net was also created for employees of the intelligence community agencies. Under the Administration proposal provided to you after S. 1095 was introduced, the employees of the Intelligence Community Agency are deemed qualified to be moved within the executive branch "unless the Director of the Office of Personnel Management has evidence of the unsuitability" of the employee.

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[1] Section 3304(c) (2) allows a judicial branch employee who served for 4 years as a secretary and/or law clerk to a Federal judge or justice to acquire eligibility for transfer to the executive branch.

In addition, the provision at issue, 28 U.S.C. § 631(j), deals with a very narrow class of persons. The task force that drafted the Administration's proposal was attempting, insofar as possible, to apply the reemployment statute uniformly to all employers and all seven uniformed services. Provisions identified as dealing with narrow groups in an inconsistent manner, therefore, were designated to be repealed.

3. Proposed new section 4326 of title 38 (as would be added by section 2 of S.1095), a provision similar to proposed new section 2034(f) as would be added by section 2 of H.R. 1578), would limit the pension benefit plan rights of persons employed by private employers to employee pension benefit plans described in section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA). Does section 3(2) cover all pension benefit plan being used by employees with private employers? If not, please provide, as a technical service, legislative language to ensure full coverage.

Yes, the definition of an employee pension benefit plan under ERISA section 3(2)(A) encompasses all employer arrangements commonly referred to as pension plans. The definition includes arrangements that provide retirement income as well as those that defer compensation until termination of employment. However, ERISA section 3(2)(B) allows the Secretary of Labor to treat severance pay arrangements and supplemental retirement income payments to retirees as welfare plans rather than pension plans.

The Secretary has exercised this authority with respect to certain of these programs in regulations codified at 29 CFR 2510.3-2 (These regulations also discuss other employer practices that do not constitute employee benefit pension plans). Therefore, while all employee pension benefit plans are covered under section 3(2)(A) of ERISA, some of them are treated as welfare plans under the Department of Labor's regulations.

4. Does proposed new section 4324 (as would be added by section 2 of S.1095) present any potential conflict with Internal Revenue Service regulations regarding defined contribution plans? If so, please provide, as a technical service, legislative language to clarify the potential conflict.

We defer to the Department of Treasury as to any potential conflict with the Internal Revenue Code or regulations presented by this section.

5. The Disabled American Veterans, on page 9 of their May 23, 1991, written testimony, suggested that report language regarding proposed new section 4323 emphasize the Department of Labor's retained authority to determine an employee's qualifications for reemployment. Does the Department have such authority now?

The current reemployment statute, the Administration's bill,

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H.R. 1578 and S. 1095, as currently written, do not give the Department of Labor (DOL) this sort of factfinding authority. Such findings of fact are made by the Federal District Courts or, for Federal employee cases, by the Merit Systems Protection Board (MSPB). Thus, if an employer insists that a returning veteran is not entitled to reemployment because he or she is not qualified, because of a physical disability or for any other reason, the DOL role would be, at the outset, to investigate whether there is a valid basis for that claim. If the DOL were to find the veteran to be qualified and otherwise eligible for reemployment, the usual case handling procedures would follow. Any final determination would be made by the court or the MSPB, with the employer having the burden of proof.

The concern expressed by the Disabled American Veterans, as we understand it, is that an employer should not be able to defeat a veteran's reemployment rights simply by asserting that the veteran is not qualified. We believe that concern is adequately addressed by the Administration's bill, H.R. 1578 and S. 1095.

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

JUL 12 1991

The Honorable Alan Cranston
Chairman, Committee on Veterans'
Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the Department's responses to the follow-up questions you submitted following the May 23, 1991, hearing on education and employment legislation. Thank you for the opportunity to provide this additional information for the record.

Sincerely yours,

Edward J. Derwinski

Edward J. Derwinski

Enclosure
EJD/flc

Questions Submitted by Senator Cranston To The Department Of Veterans Affairs In Follow-Up To May 23, 1991, Hearing

Question: 1. The Enlisted Association of the National Guard, on page 2 of their May 23, 1991, written testimony expressed concern that section 2 of S. 868, which would provide coverage to members of the Selected Reserve who had to discontinue their educational pursuit as a result of being ordered to serve on active duty in connection with the Persian Gulf War, would exclude those who had to discontinue the same pursuit as a result of volunteering for such service. Would this be VA's interpretation?

Response: The language in section 2 of S. 868 refers to individuals ordered to active duty under sections 672(a), (d), or (g), or 673b of title 10, United States Code. The above sections, with the exception of section 672(d), provide authority to order any unit (and any member not assigned to a unit) of a reserve component to active duty without the consent of those affected. Section 672(d) provides that a member of a reserve component may be ordered to active duty or retained on active duty with the member's consent. We defer to the Department of Defense's interpretation of whether the scope of the latter provision embraces the volunteer mentioned in your question.

Question: 2. Proposed new section 4322(d)(2) of S. 1095 provides that certain disabled veterans would have up to two years after the completion of their active-duty service to report back to their employer. The Disabled American Veterans, on pages 7 and 8 of their May 23, 1991 written testimony suggested that VA Veterans Rehabilitation Specialists and Counseling Psychologists should be assigned case-manager responsibilities and be an intricate component of the rehabilitation plan. The DAV also suggested that, at the earliest possible date, VA and a representative of the employer meet with the disabled veteran to determine whether the job is still available; the veteran can return to his or her previous job with or without job modifications or accommodations; the veteran would need any retraining or special equipment to facilitate a return to the job; and if it is otherwise medically infeasible or if another job of comparable status is offered, any accommodations or special equipment or training would be needed. What are VA's views on these suggestions?

Response: Vocational rehabilitation specialists and counseling psychologists of the Vocational Rehabilitation Service are involved in helping service-disabled veterans who are eligible for and

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SENATOR CRANSTON

entitled to assistance under chapter 31 make the best use of their reemployment rights. Consideration of reemployment rights is a part of a comprehensive evaluation of the veteran's situation. If use of reemployment rights emerges as the most appropriate method of securing suitable employment, then this course is vigorously pursued. However, our experience also indicates that there are situations, particularly for young veterans with little in the way of significant education, training or employment where a return to prior employment is not in the veteran's best interest.

The suggestions made by DAV include many of the services which VA would furnish as a part of a rehabilitation plan under chapter 31 in which the goal of the program is to enable the veteran to become reemployed in the occupation which he or she had held prior to his or her service in the Armed Forces. We have no objections to the specific suggestions made by DAV to help secure a veteran's reemployment rights. However, we believe that our staff should retain the flexibility both to help a veteran determine whether a return to prior employment is in his or her best interest and to use the procedures suggested by DAV on an individual basis as appropriate to the veteran's situation.

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

JUN 20 1991

Honorable Alan Cranston
Chairman, Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am enclosing my response to your question following the Committee's May 23, 1991, hearing concerning your bill, S. 1095, to amend the Veterans Reemployment Rights law.

I certainly support your efforts to make the statutory employment protections for veterans and reservists clearer. I look forward to continuing to work with you and your staff on S. 1095 as well as other issues of interest to veterans.

Sincerely,

Constance Berry Newman

Constance Berry Newman
Director

Enclosure

QUESTION FOR THE OFFICE OF PERSONNEL MANAGEMENT IN FOLLOW-UP TO MAY 23, 1991, HEARING

Q. The Disabled American Veterans, on page 9 of their May 23, 1991, testimony, asked whether current law provides that a veteran who is eligible for restoration to federal employment is entitled to all rights and benefits of federal employment, including pay, while a federal agency and the Office of Personnel Management are making a determination regarding the feasibility of reemployment or seeking to place him or her in a comparable job. What is OPM's position on this question?

A. Applicable OPM regulations under the Veterans' Reemployment Rights law provide that an individual returning from military duty who is entitled to mandatory restoration "must be restored as soon as possible after making application but in no event later than 30 days after the application is received by the agency." [5 CFR §353. 301(a).] Thus, the "feasibility" of restoration is not an issue; the agency is obligated to restore a returning employee as soon as possible. In most instances, the employee simply returns to his or her former position and there is no delay in restoration. The instances in which restoration is delayed beyond 30 days are very rare and in these cases the employee would receive back pay plus interest for loss of salary during periods in excess of 30 days.

Federal employees may appeal an employing agency's failure to restore, or an improper restoration, to the Merit Systems Protection Board [5 U.S.C. 1204(a)]. On determination that an agency has failed or refused to comply with applicable law or regulation, MSPB may order corrective action and back pay for any loss of salary the employee suffered by reason of the agency's noncompliance.

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

JUL 30 1991

The Honorable Thomas Daschle
Committee on Veterans' Affairs
United States Senate
Washington, D. C. 20510

Dear Senator Daschle:

Enclosed please find the Department's responses to the questions which you submitted following the Committee's May 23, 1991, hearing on Education and Employment Benefits. Thank you for the opportunity to provide this additional information for the record.

Sincerely yours,

Edward J. Derwinski

Enclosure
EJD/flc

Questions Submitted by Senator Daschle
to the Department of Veterans Affairs
Following the May 23, 1991, Hearing

Question: 1. What is the average time for benefits processing at the St. Louis Regional Processing Center?

Response: St. Louis completes 77 percent of the initial chapter 30 claims within 22 days. They process 97 percent of the reenrollments within 8 days.

Question: 2. Is information on the number of recipients of on-the-job training (OJT) and apprenticeship benefits readily available from St. Louis?

a. If so, how many veterans are utilizing these benefits in the region?

b. If not, why is this information not yet available?

Response: Information is available from St. Louis. The information shows that at the end of March 1991, the St. Louis Processing Center awarded chapter 30 benefits to 123 veterans pursuing on-the-job and apprenticeship training.

Question: 3. Certainly, veterans are informed of their GI Bill benefits upon separation. What efforts are being made by the Department to inform veterans of OJT benefits that are available to them under the GI Bill?

Response: Preseparation briefings are provided to servicemembers who will be separated in the near future. This effort is part of the Transition Assistance Program authorized by Pub. L. 101-510. Centrally prepared briefing materials address apprenticeship and other on-the-job training opportunities as one of the several options available as part of the GI Bill.

Similarly, apprenticeships and other on-the-job training is described in VA publications as one type of education and training that is available to qualified veterans. The various types of training opportunities are generally listed without emphasis on any one particular type; e.g., in discussing noncontributory GI Bill benefits, VA Pamphlet 27-82-2 (A Summary of Department of Veterans Affairs Benefits) covers apprenticeship or other on-the-job training as a subheading; in discussing the Montgomery GI Bill, this same pamphlet has all training opportunities listed in one paragraph:

> Benefits are payable for attendance at institutions of higher learning, noncollege degree programs, apprenticeship/on-job training and pursuit of correspondence training. Veterans may pursue refresher, remedial and deficiency courses, and qualify for tutorial assistance.

2.

Senator Daschle

VA Pamphlet 27-82-2 is mailed to each veteran 6 months after separation as part of the Veterans Assistance Discharge System (VADS). However, a special mailing for chapter 30 eligible individuals has been initiated as part of the VADS program and this mailing highlights eligibility to the various categories of education and training, including OJT and apprenticeship. In addition, VA Pamphlet 22-79-1, which describes chapter 32 (post-Vietnam Era veteran's educational assistance program), is mailed to each veteran who may qualify for that benefit program.

A significant number of the more than 10 million public veterans assistance contacts each year are from new veterans and those eligible under one of the several education programs. These contacts result in extensive information dissemination on the various education programs and specific information on OJT/apprenticeship as it may appear warranted.

We also send a veteran a summary of education benefits under the Montgomery GI Bill, VA Pamphlet 22-90-2 (Summary of Education Benefits Under the Montgomery GI Bill - Active Duty Educational Assistance Program), after we receive an application for chapter 30 benefits. Thereafter, a copy is sent annually to individuals in receipt of chapter 30 benefits.

Question: 4. What is the status of the report by the "Committee to Assess Veterans' Education," which was due last August pursuant to section 320 of Public Law 99-576?

Response: This report is still undergoing interagency review. In accordance with the Office of Management and Budget's request, we are preparing current cost estimates for each of the recommendations made in the report as necessitated by the Omnibus Budget Reconciliation Act of 1990.

O